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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1300

GENERAL WAREHOUSEMEN AND HELPERS LOCAL 767, Affiliated With the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

vs.

STANDARD BRANDS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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Petitioner, General Warehousemen and Helpers Local 767, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 15, 1978.

OPINIONS BELOW

The findings, opinion and award of the arbitrator, Professor Charles J. Morris, are unreported. They are reproduced in the Appendix at p. A-1 through p. A-45.

The unreported findings, conclusions, and order of the United States District Court for the Northern District of Texas, denying enforcement of the arbitral award are reproduced in the Appendix at p. A-46 through p. A-53.

The original opinion of the Court of Appeals for the Fifth Circuit, rendered October 11, 1977, enforcing the arbitral award is reported at 560 F.2d 700. It is reproduced in the Appendix at p. A-55 through p. A-70. The dissent appears at p. A-70 through p. A-73.

The *en banc* opinion of the Court of Appeals for the Fifth Circuit, rendered September 15, 1978, affirming the District Court's denial of enforcement of the arbitral award, and remanding to the District Court, is as yet unreported. It is reproduced in the Appendix, Majority Opinion p. A-75 to p. A-99; Dissent p. A-99 to p. A-103.

JURISDICTION

The order of the Court of Appeals for the Fifth Circuit refusing Petitioner's Motion for Rehearing was entered December 28, 1978, and this petition for certiorari is being filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

This case presents questions as to the availability of specific performance to enforce an arbitral award requiring an employer to permit employees to transfer to a new plant at established wages without loss of seniority.

The specific questions are:

1. May an employer who violates a collective bargaining agreement (which provides that covered employees may follow their work to a new plant) avoid specific performance of the collective bargaining agreement by contracting with another union at substandard wages and conditions to cover the work at the new plant?

2. Does the arbitral award unlawfully infringe upon the self-organization rights of the employees at the new plant to the extent that the award must be denied specific enforcement, either:

> (a) as in conflict with the agreement between the employer and another union, executed during the pendency of the arbitration, and providing lesser wages and conditions at the new plant? or,
>
> (b) as in conflict with NLRB certification of the other union, based upon an election at which only the new employees were allowed to vote?

3. Did the Court of Appeals err in limiting damages to those incurred during the contract term; and in refusing specific performance when the IAM contract and certification terminated?

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Labor Management Relations Act of 1947, as amended, are:

29 U.S.C. § 173(d) which declares a national policy that: "(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

29 U.S.C. § 174 ". . . employers and employees and their representatives in any industry affecting commerce shall—(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours and working conditions . . ."

29 U.S.C. § 185 (a) and (c), set out in the Appendix, (p. A-105) provides federal jurisdiction of suits for violation of contracts between an employer and a labor organization.

STATEMENT OF THE CASE

This action was brought under §301(a) of the Labor Management Relations Act (29 U.S.C. §185(a)), by Petitioner (herein "Teamsters") to enforce a labor arbitration award against Standard Brands, an employer, party to a Dallas, Texas, collective bargaining agreement. The arbitration process was, as the courts below found, "regular and has been pursued in accordance with the provisions of a collective bargaining agreement."[1]

The arbitration findings and award (App. pp. A-1-A-45) concern the opening of a new Standard Brands margarine plant in Denison, Texas, and the closing of an existing margarine plant in Dallas, Texas. The Dallas plant had long been represented by Teamsters, and the collective bargaining contract there, as the Court of Appeals found, contained provisions protecting the rights of the employees if the Dallas operations should be "transferred permanently to a new plant . . .".

Standard determined, prior to 1974, to build a new plant in Denison, some 75 miles from Dallas. When Dallas employees, uneasy that their jobs were in jeopardy, sought assurance that Standard would not eliminate Dallas jobs or transfer Dallas operations to Denison, they were repeatedly assured that the Dallas operations would not be affected. Actually, Standard then intended to—and later did—close the Dallas plant. Without detailing all that is found in the arbitrator's lengthy decision (App. p. A-1 to p. A-45) it is clear (as the arbitrator found and as the courts below accept[2]) that Standard "intended to operate Denison non-union, and it especially tried to operate it without the Teamsters Union and its contract."[3]

[1] The pertinent provisions of the Dallas collective bargaining agreement are set out in the arbitrator's decision at pp. 3 to 8 of the Appendix to this Petition. See footnote 1 to the majority decision, *en banc*, below, App pp. 77 to 78, *infra*.

The Denison plant opened in the fall of 1974. Teamsters' written request for transfer rights as provided in the Dallas contract was ignored; Teamsters filed a grievance which asserted that the operation of the new plant would result in the closing of the old one—and requested, in that event, the protection of the Dallas employees as provided in their contract.[4]

The Dallas plant actually closed October 1, 1975. Meanwhile, the Teamsters' grievance, denied by Standard Brands, was submitted to the arbitrator, who after two hearings and a plant inspection, issued the opinion and award which is the subject of this litigation (App. 1-54).

The arbitrator found that Standard had engaged in a series of specified violations of the Dallas collective bargaining agreement, that Standard's actions had been designed to assure operation of the Denison plant "non-union" and had resulted in "discrimination against the Dallas employees because of their Teamsters Union membership."

The arbitrator further specifically found Standard to have violated that section of the collective bargaining agreement which had assured the Dallas employees the right to fill jobs at the Denison plant.[5]

[2] App. p. 41, *infra*; 560 F.2d 701 (5th Cir. 1977).

[3] Arbitrator's Opinion, App. p. 42, *infra*.

[4] See contract provisions displayed in the arbitrator's Opinion, App. pp. 3-8, *infra*.

[5] See Arbitrator's Opinion, App. pp. 41 to 42, *infra*.

While the Teamsters' claim was pending in arbitration Standard agreed with another union (IAM), over Teamsters' objection, for NLRB to conduct an election at Denison. The election agreement permitted only the newly hired Denison employees to vote.

IAM won the election,[6] was certified by NLRB, and in less than a month from the certification Standard had signed a contract with IAM covering the Denison plant providing wage rates "significantly lower than comparable rates in the Dallas Teamsters agreement."[7]

Having found gross violation of the Teamsters collective bargaining agreement, the arbitrator sought to remedy the violations, and at the same time not to intrude upon the rights of the newly hired Denison employees. The arbitrator accordingly wrote; App. p. 42, *infra*:

> What is an appropriate remedy? I have tried to balance the contract rights of the Dallas employees with the interest of the present Denison employees who are wholly innocent in this proceeding. Had the Company not violated the agreement initially, the Teamster's Union, probably under the same contract, would most likely be the bargaining representative of the Denison employees, who would have been mostly former Dallas employees—the record indicates that most of them would have accepted transfer. I will not so order, however. Nor will I order the Company to displace any present employee. As well as violating other provisions, the Company did violate the contractual counterpart of Section 8(a)(3) of the National Labor Relations Act, for which affected employees would

[6] Standard advised NLRB in late 1974 that "the Denison plant is fully staffed," although it only had 26 employees there, and several major manufacturing lines were yet to be started up. Arbitrator's Opinion, App. p. 36, *infra*.

[7] Arbitrator's Opinion, App. p. 37, *infra*.

be entitled to be made whole as to their losses. So far, however, there have been no losses; what we are concerned with are future rights and the avoiding of losses. Accordingly, subject to the limitations noted below, I hold that all Dallas employees who desire to transfer may do so and that they will acquire new seniority based upon the first working day at the Denison plant (a day in late October, 1974, as described hereinabove), and their relative same seniority date) will be based upon length of service with the Company. The Company will be required to provide suitable employment at the Denison plant, beginning the first regular work day following the termination of their employment at the Dallas plant, to as many of those Dallas transferees as are required for the operation of stick or bulk margarine operations,[8] provided, however, that such operation shall include at least two lines using Benhil equipment or the equivalent. If additional operations are added, such as Morpak lines, with or without whipped or bulk margarine production, any Dallas employees not otherwise assigned will be assigned to these jobs before employment is offered to anyone else. And if vacancies occur in other production or maintenance jobs at the Denison plants, such jobs are to be filled by Dallas transferees, so long as they are available and qualified to do the work. If there are any persons from the Dallas plant desiring to transfer in excess of those required for the aforesaid jobs, such persons shall be placed on a preferential hiring list and shall have the rights of employees on permanent layoff under the contract herein.

It is recognized that the addition of these several manufacturing lines and newly transferred employees will materially alter the bargaining unit at Denison and that

[8] As made clear earlier in the arbitral decision, Dallas employees had been manufacturing stick and bulk margarine. (Arbitrator's Opinion, App. p. 11; *infra*).

eventually the NLRB will have to determine the resulting questions concerning representation. Until that time, however, the provisions of the present Teamsters contract will govern the compensation and other benefits of the employees performing work of the same nature as the Dallas operations. Such contract, however, will not govern any other job in the plant even though such job may be filled by a Dallas transferree, for such job would logically be covered by the IAM contract.

The parties are further required to appoint their representatives under Part I, Section (j) as promptly as possible for the purpose of implementing transfer and related rights provided by Section 13, as interpreted by this Award. I shall retain jurisdiction over the parties and subject matter of this grievance pending compliance with this award.

IAM challenged the transfer and seniority provisions of the award by charges before NLRB. Prior to trial of the charges IAM withdrew them. The withdrawal was with the consent of the General Counsel of NLRB, recorded in an opinion published at 1966-67 CCH NLRB ¶ 20,020 at p. 32,030 App. pp. 105-109, *infra*.

Teamsters filed this action to enforce the award, the District Court denied enforcement on the ground "that the arbitrator exceeded the scope of his authority since his award is in conflict with the NLRB's certification of the IAM in Denison."[9]

The majority of the Fifth Circuit panel which first heard the appeal (Judges Tuttle and Wisdom) noted that the "arbitration decision has passed one test before the NLRB," in that IAM's challenge by unfair labor practice charge of the propriety of "bumping" Denison employees by transfer from Dallas was

[9] App. p. 47, *infra*.

withdrawn—with formal opinion from the NLRB General Counsel (560 F.2d 704, App. p. 62, *infra*) which the Court noted, viz:

> "The NLRB Division of Advice concluded that the Machinists should be permitted to withdraw the charge. One basis for the Division of Advice's reaction was the Machinists' desire to drop the matter. But the Division also commented that "the Employer's actions in transferring a Dallas employee to Dennison [sic] and applying Dallas seniority to him were considered to have been in compliance with, and therefore privileged by the arbitration award . . ."[10]

Judge Coleman, in dissent, 560 F.2d 709, App. p. 70, *infra*, said that the "true issue is whether the District Court abused its discretion when it denied enforcement"; he viewed the Union's

[10] The majority opinion of the Circuit Court panel goes on to observe at 560 F.2d 704, App. p. 62, *infra*:

> "The same NLRB memorandum, however, appears to question the propriety of the award's extension of Dallas contract terms to Denison. The memorandum only approved of the award 'as modified'—an apparent reference to the decision by the district court not to enforce the application of the Teamster contract at Denison. Moreover, the Division comment that
>
> 'If the Circuit Court is being asked by the Teamsters to apply other provisions of the Teamster contract to the Denison employees so that the Machinists' certification rights would be undermined, the Machinists may wish to seek Board intervention. Such a request would be forwarded to the Division of Litigation.'
>
> *Id.*, at n.8.
>
> Had the Board appeared in our case, its views would have received careful consideration . . . It is one thing for a court to refuse to enforce an arbitration award when the NLRB protests that enforcement would impair Board processes. It is another to 'protect' the Board's processes when no unfair labor practice charge is presently pending and no request for a stay of enforcement has been heard from the Board."

actions as "merely attempts to subvert the NLRB order" (sic)[11] regarding "the proper bargaining unit"[12]; and he urged that effectuation of the award "would result in an unfair labor practice in violation of §158(a)(1,3) of the National Labor Management Relations Act." (App. p. 72).

Standard's Motion for Rehearing *en banc* was granted, and on rehearing the majority, now speaking through Judge Coleman, the original dissenter, held:

> ". . . that the remedy prescribed by the arbitrator required the employer to *violate the terms of another of its collective bargaining agreements* with a bargaining unit[12a] duly certified by the National Labor Relations Board." (App. p. 76 emphasis added).

The *en banc* majority stated the issue (erroneously, in our view) at App. p. 89, *infra*:

> ". . . whether a federal district court can enforce the remedial provisions of an arbitration award which would require the employer to violate the terms of another collective bargaining agreement."

and defined "the nub of the dispute" as "if the Court directs enforcement of the arbitrator's award it *may be* affirmatively causing the employer to be ordered to commit an unfair labor practice under 29 U.S.C. §158(1).[13] This cannot be done" (App. p. 90, *infra*, emphasis added).

Ostensibly eschewing a direct holding that to enforce the award is to require the employer to commit an unfair labor

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[11] Actually, no NLRB "Order" was ever sought—much less—issued. Presumably, Judge Coleman refers to the IAM "certification."

[12 and 12a] Presumably, Judge Coleman means bargaining *"agent"*.

[13] In dissent, in panel, Judge Coleman had also argued §158(a)(3) was violated. The *en banc* opinion, at footnote 7, eschews any determination as to §8(a)(3) violation.

practice, the *en banc* majority holds "that the award was repugnant to the NLRA, and [we] accordingly affirm the District Judge . . ." (App. p. 93, *infra*).[14]

In short, the *en banc* majority views the arbitral award as (1) requiring Standard to violate its contract with IAM, and (2) as requiring Standard to take action which the Court viewed as "repugnant" to the NLRA."[14a]

Five judges[15] joined in dissenting, for in their view the award does not conflict with the NLRB certification of the IAM, nor does it require Standard to violate the terms of its agreement with the IAM (App. p. 99, *infra*).[15a]

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[14] The *en banc* majority holds at App. p. 93, *infra*, that:

> "Unions are vitally concerned, and properly so, with their right to bargain over wages, benefits, seniority and working conditions. Section 9(a) of the NLRA expressly recognizes such a right for a union if it is certified by the NLRA. If a contract or an arbitration award conflicts with that policy, the statutory policy must prevail. We think that a contract specifying that an employee transferring to another plant operated by the same employer would continue to receive the same wages and benefits that he received at the old plant, despite the existence of a contract with another union at the new location would be unenforceable. It necessarily follows that an arbitration award which seeks to achieve the same impermissible result cannot be enforced."

[14a] Yet significantly, the Court did *not* itself hold that by taking the action required by the award it would commit an unfair labor practice. The majority, in agreement with the dissent recognized that as a function of NLRB—not the Court.

[15] Tuttle, Wisdom, Goldberg, Rubin and Vance.

[15a] On June 9, 1978, upon expiration of the IAM contract with Standard Brands in Denison, the NLRB conducted another election. In this election IAM received only one vote, the Teamsters received fifty-two votes, and thirty-four votes were cast for no union. Company objections to the election have delayed certification of the Teamsters as the collective bargaining agent. A motion for rehearing *en banc* presented the facts of this election to the court. The court denied the motion without opinion. App. p. 104, *infra*.

REASONS FOR GRANTING THE WRIT

1

The importance of the questions here presented comes in focus when the holding of the Court of Appeals is considered in the context of the plight of workers, their unions, and the economies of the North and Midwest from which their employers are moving to the "Sunbelt," or to rural locations. As the Court of Appeals wrote at App. p. 95, *infra*:

> "The movement of plants from one location to another, the transfer of functions between plants, and the movement of workers between plants are subjects of vital concern for both labor and management. Employees are interested in continuity of employment, income, and seniority rights. Employers, on the other hand, need flexibility to respond to competitive forces and to increase efficiency. Such agreements are important, perhaps necessary, features of the modern mixed economy and are entitled to be respected."

Accordingly, ". . . contractual provisions such as those at issue in this case have become a common feature in collective bargaining agreements nationwide."[16] They have long been regarded as a necessity in protection of employees against unscrupulous employer undercutting of their union wages and conditions.[17] See, *"Plant Relocation: Catching Up With the Runaway Shop,"* XIV Boston College Law Rev. 1135-1169 (1973).

Mobility of industry in this age is a commonplace. Movement from the industrial (and organized) North to the Southern

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[16] Majority *en banc* opinion App. p. 95, *infra*.

[17] Hearing before the Subcommittee on Labor Standards on the National Employment Priorities Act at p. 73. See also; Rifkin & Barber, *The North Will Rise Again*, Beacon Press, (1978).

(and unorganized) "Sunbelt" is increasing. Major changes in plant locations have occurred in the last decade—and further changes are imminent. Responsible publications proclaim that there is a veritable reshaping of the demographic and economic map of the nation. See "Business Loves the Sunbelt (and Vice Versa)" *Fortune*, June 1977; pp. 132-146; and "The Second War Between The States, Bitter Struggle for Jobs, Capital, and People," *Business Week*, May 17, 1976, p. 92 ff.[18] Or as the testimony before a Congressional Committee recently revealed:

> "Here is a company that built a billion dollar corporation because of the sweat, tears, and muscles of the Akron employees. They have expanded to almost every State in the Union, even to most foreign countries, and yet they cut jobs from the very plant that gave them its beginning. It's sort of sad, isn't it, Mr. Chairman? Here is a company that over the years has not only raped the natural resources of the community: The water, the air and the land, and yet even the citizens, and has never really paid for its fair share. Here is a company that really feels it has the

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[18] "As long as the migration of industry and population was gradual from what was a relatively rich Northeast to what was a relatively impoverished South and Southwest, it helped to unify the nation. But within the past five years the process has burst beyond the bounds that can be accommodated by existing political institutions.

Less than three years ago, the Commerce Dept.'s Bureau of Economic Analysis published projections for 1980 and 1990 of the population, personal income, and employment in each of the 50 states—Arkansas, Louisiana, Mississippi, South Carolina, Arizona, Texas, Utah, Alaska and Hawaii—had already exceeded their 1980 projections in population, and one state—New Mexico—had already surpassed the 1990 figure. By the same token, the shortfall in slower-growing regions has been enormous. For example, New York was expected to grow by 1.1 million people from 1970 to 1980, but thus far the state has lost more than 100,000. Pennsylvania, slated to gain nearly 800,000 during the 1970s, has increased its population by barely 30,000 thus far. This is virtually the same growth posted by Illinois, where the BEA expected a rise of nearly 900,000."

right to destroy the families of thousands of its employees simply by saying, 'We are moving on.' "[19]

In the past decade there have been two trends in plant relocation. Companies have moved from the north to the south and from the cities to the suburbs, and now to small towns. (For statistics on movement from north to south see Table entitled "Employees on Manufacturing Payrolls, by Region and State, 1967-75," Handbook of Labor Statistics, for numbers on urban-rural movement see Maurice Fulton, *New Factors in Plant Location*, 49 Harv.Bus.Rev. 4, 5-6 (May-June 1971).[20]

As the industrial migration continues the rural South will for sometime provide a large pool of inexperienced and willing labor, abundant land, tax concessions, and state legislatures attuned to providing industry a "healthy business climate."

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[19] Hearings before the Subcommittees on labor standards of the Committee on Education and Labor, House of Representatives, on H.R. 76, the National Employment Priorities Act, Akron, Ohio, May 9, 1975.

[20] Headlines in the Dallas Times Herald, January 21, 1979 proclaimed: "Bill aims to stem Snowbelt exodus" and stated:

> "Sen. Harrison A. Williams, Jr., of New Jersey will introduce landmark legislation later this month aimed at slowing the exodus of industry from the Northwest and Midwest, it has been learned.
>
> The measure would require employers to provide for the financial security of their workers before closing up shop or moving to another state.
>
> The bill is expected to lead to one of the hottest labor-related debates of the 96th Congress. Strong opposition is anticipated from the business community and from the 'Sunbelt' states which often are the beneficiaries of plant closings in the Northern 'Sunbelt.'
>
> Williams, a Democrat, is chairman of the Senate Human Resources Committee.
>
> A draft copy of the proposed legislation, obtained by the Newhouse News Service, shows it would obligate an employer to protect the 'social and economic health' of his workers in the same way he now is required to protect the environment of the area where the plant is located.
>
> 'Just as a firm must now recognize that its pollution is a social cost for which the firm must take some responsibility, it is now time to recognize that the relocation or closing of a plant or factory by a firm imposes costs on others for which the firm must be in some part responsible,' the draft states."

Energy savings resulting from environmental characteristics are additional reasons to accelerate industrial movement.[21]

Organized employees, and the unions which represent them protect against the employer who announces "We are moving on," by obtaining collective bargaining protections similar to those at bar.

Yet, the Court of Appeals says, they are not to be specifically enforced,[22] and this is the Court which declares the law for that portion of the Sunbelt which stretches from Florida to Texas—the very area into which the nation's industry is moving.

The rights here at issue—those of incumbents provided in collective agreements—as well as those of new hires in low wage areas to which industry moves—all evolve from the same federal statute. The balance to be drawn requires definitive decision of important questions of broad application. As we demonstrate, the Court of Appeals' holding that incumbent's contract rights are obliterated by the employer contracting with others is plain error.

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[21] See Fulton, "New Factors in Plant Location," 49 Harv. Bus. Rev. 4, at 5-6, reporting that more than 33% of the moves are to small non-metropolitan areas. He predicts: "the trend is likely to continue, particularly away from the largest cities."

[22] Compare the Court of Appeals (at p. 7006):

> "We think however, that if the Denison plant had not been organized prior to the award it would have been readily enforceable in its entirety against Standard."

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Quite aside from these important practical questions is the necessity of providing guides as to the balance between rights specified in lawful collective bargaining agreements and those flowing from NLRB certifications. Not since *Carey v. Westinghouse*, 375 U.S. 261 (1964) 11 L.Ed.2d 320 has this court addressed the questions of the respective roles of arbitration and NLRB bargaining unit determinations. There this Court endorsed arbitration as a means to solve either work assignment or representation disputes. And though not there met with conflict with an NLRB Order, stated that in the event of such conflict, the NLRB Order would prevail.

But does an arbitral award "conflict" with an NLRB § 9(c) "certification" (as distinguished from a § 10 "Order"), when it specifically enforces individual employees' seniority and wage rights provided in their Union agreement?

In Civil Rights cases this Court found no conflict with the federal statute in honoring established and lawful seniority systems and "slotting" those workers who have been the victims of unlawful racial discriminations in the *bona fide* seniority systems provided by the collective agreement.

So here, there should be no impropriety in assigning metropolitan employees who move to the new plant the seniority they would have enjoyed had the employer not violated their contract rights.

And "Red Circle Rates" are a commonplace in the world of labor relations—i.e., the assignment of particular individuals rates above the contract minimum is often done—and for a variety of legitimate reasons. Does such assignment "violate" the certification issued by NLRB?[23] May a court, on speculation

[23] As we have seen *supra* p. 11, both the IAM contract and the NLRB certification expired in June 1978. There then could not be "conflict" with the expired contract or the superceded certification.

that it might, refuse to vindicate by specific performance the rights provided in a collective bargaining agreement which is the favorite of the federal policy?

Both NLRB and arbitrators are essentials in the statutory scheme by which workers rights are to be protected, and the public's stake in the stability of labor relations which flows from enforceable collective bargaining agreements is to be vindicated.

The procedures and powers of both the administrative law and the arbitral process are a necessity to promote the national labor policy. Until and unless there is actual conflict, neither should be required to give way to the other. Surely, the lower court's general notion that to vindicate rights to jobs and wages is somehow "repugnant to," though not necessarily violative of, the National Labor Relations Act ought not to stand.

3

The conventional remedy for violation of a collective bargaining agreement is specific performance.[24] Yet the remedy is to be denied, says the majority below, because the employer has now signed a contract with another. The conventional remedy is denied because he who broke the agreement, has blocked the remedy by subsequent contract with another union.

When S sells a house to B-1, he may not avoid specific performance of his agreement to deliver the house to B-1 by his subsequent agreement to sell it to B-2.[25]

Labor relations policy considerations do not point to any different result. Indeed, labor policy reinforces what would be

[24] The majority *en banc* wrote at App. pp. 92-93, *infra*:

". . . if the Denison plant had not been organized prior to the award, it would have been readily enforceable in its entirety against Standard."

[25] The *Law of Contracts*, Baker Voorhis & Co., New York, 1920, §1429.

the certain result in commercial law. Federal labor policy encourages and protects the collective bargaining contract, provides for its enforcement by specific performance.

Federal labor policy protects against the runaway shop; for as NLRB has redundantly held, plant relocation becomes unlawful when the move is effected, as here, for anti-union motives. See *"Plant Relocation—Catching Up With the Runaway Shop,"* XIV Boston Col. L.Rev. 1135 (1973); Sheinkman, *"Plant Removal Under the National Labor Relations Act,"* 16 NYU Conf.Lab. 81 (1962), and cases there cited.

Admittedly, specific performance of limitations on plant removal provisions in collective agreements will have some adverse affect upon putative or newly hired workers at the new plant. These new hires have statutory rights to self organization and collective bargaining. But to elevate the rights of the new employees at the rural location above the contractual rights of 30 year veterans is to turn the statute topsy-turvy.

The purpose of the statute is to promote the practice of collective bargaining, to foster written collective agreements to which all parties are to be bound. Rights so established should not evaporate when an employer violates both his collective bargaining agreement and the statutory rights of his employees. Here, the move to Denison was (as the arbitrator found)[26] for the purpose of "going non-union," and to discriminate against the Dallas employees because of their Teamsters affiliation.

There is no suggestion here that NLRB viewed the enforcement of the arbitral award as violative, either of its certification, or as an unfair labor practice intrusion on the rights of the rural employees. To the contrary, as the original opinion

[26] The Circuit Court majority stated:

". . . we are not unmoved by the employees' situation. We also accept the finding of the arbitrator and we do not condone the company's conduct. It is noteworthy that Standard itself does not deny the contractual violations. . . ." (at headnotes 6, 7) p. 7008.

of the Court of Appeals panel specified, charges of unfair labor practice were withdrawn, with NLRB approval, upon the NLRB counsel's published opinion that no unfair practice was shown.

The *en banc* majority does not dispute this—indeed, they acknowledge (footnote 7) ". . . it would be difficult for the NLRB to find the necessary discriminatory intent" to support §8(a)(3) violation should the award be obeyed. The *en banc* majority further is specific, at footnote 7:

> ". . . we certainly express no opinion as to whether enforcement of this award in the circumstances of this case would constitute an unfair labor practice in violation of 29 U.S.C. §158(a)(3). That is a task for the Board."

It is, indeed. And unless and until the Board so finds, there is no conflict with the arbitral award. In the absence of such conflict, a valid award ought not be thwarted by a court's general notion that it is "repugnant" to the Act.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

ARBITRATOR'S OPINION AND AWARD

In the Matter of the Arbitration Between Standard Brands Incorporated (Dallas Margarine Plant) and Local 767, International Brotherhood of Teamsters	Opinion and Award (Denison Plant Grievance)

Before CHARLES J. MORRIS, Arbitrator selected by the parties

NATURE OF THE CASE

This case concerns the opening of a new Standard Brands margarine plant in Denison, Texas, and the closing of an existing margarine plant in Dallas. At issue are the rights, if any, of the "production and maintenance employees and laboratory testers" at the Dallas plant under a collective bargaining agreement with Local 767, International Brotherhood of Teamsters, successor to Local 159, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO. The Union contends that the Dallas employees have job rights at the new Denison plant, which is located about 75 miles from Dallas. The Company disputes this, contending: that the Denison plant produces soft tub margarine which the Dallas plant has never produced, that "Denison is not equipped to manufacture quarter pound stick or whipped stick product," which the Dallas plant produces, that "no operations at the Dallas margarine plant have closed [and] no Dallas employee with seniority has been laid off as a result of the opening of the

Denison plant." The Company made these contentions in its brief filed on May 1, 1975. Since that date, the record has been reopened to receive evidence that the Company will "permanently cease operations at the Dallas margarine plant at the close of business on October 3, 1975."

It goes without saying that this case is governed by the collective bargaining contract. But because that contract incorporates certain pertinent requirements in the National Labor Relations Act, I am especially mindful of the Arbitrator's obligation under the decisions in *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955), and *Collyer Insulated Wire*, 192 N.L.R.B. No. 150 (1971). In *Spielberg* the National Labor Relations Board defined the standard under which it would defer to the arbitration process when arbitration issues under a collective agreement overlap unfair labor practice issues; to wit, when "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." In *Collyer*, the Board reaffirmed the *Spielberg* doctrine and established an additional doctrine: that it would withhold NLRB processes in such cases prior to arbitration when the collective contract made available a quick and fair means for the resolution of this dispute including, if appropriate, a fully effective remedy for any breach of contract which occurred."

The present case appears to meet the *Collyer* standards. Although the Union claims that the Company had violated specific contractual provisions, the conduct in question would also, if brought to the NLRB, involve unfair labor practice questions under Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the NLRA (29 U.S.C. §141 et seq.) I am thus mindful of my responsibility to the parties and recognize that this case severely tests the theory and philosophy behind *Spielberg* and *Collyer*, for this decision will, of necessity, treat such volatile issues as alleged discrimination against union membership, alleged denial of employment on account of union representation, and alleged refusal to bargain in good faith—all however in the context of specific contractual requirements. In attempting to meet the Spielberg standards I do not lose sight of my primary objective, which is to give effect to the contractual language which the parties have negotiated.

GRIEVANCE—

The grievance herein was filed on November 21, 1974, and reads as follows:

> The union is filing a grievance on behalf of the Dallas, Texas margarine workers. Cited in this grievance are Section 13(E) and 13(F) of Part I and other pertinent clauses covered by this contract. We feel these clauses cover these employees because the building and opening of the new margarine plant built in Denison, Texas will result in the closure of the Dallas plant and will adversely affect the employees covered by the current labor agreement now in effect.
>
> We further feel that the thirty people whose names were submitted for transfer are covered by Section 14(E) of Part I. We are requesting arbitration on these issues.

PERTINENT CONTRACT PROVISIONS—

The following provisions of the collective bargaining contract are pertinent:

Part VIII, Section 1—

BARGAINING UNIT

> The Company recognizes the Union as the sole and exclusive collective bargaining agent for all production and maintenance employees and laboratory testers at the

Company's margarine plant at Dallas, Texas, excluding supervisory, clerical and professional employees.

Truck drivers and helpers loading or unloading will be permitted only in the immediate dock area. All orders will be filled by Local 159 bargaining unit members.

Part I, Section 13—

SEVERANCE ALLOWANCE, PLANT CLOSINGS AND TRANSFERS

(a) Before any plant or department is closed, the Union will, if possible, be given thirty days' prior notice.

(b) Employees with ten years or more of service who are permanently laid off for lack of work due to technological improvement, or changes in production methods or processes including the method of shipping, receiving or handling materials, the closing of a department or a plant or part of a department are entitled to a severance allowance of one week for each year of service to a maximum of thirty weeks. An employee with three but less than ten years of service so laid off is entitled to a severance allowance of one week for each year in which he worked one thousand or more hours and one-half week for each year in which he worked less than one thousand but more than two hundred hours and none for any year in which he worked less than two hundred hours.

(c) A permanent lay-off is one which is expected to last for six months or longer. . . .

(d) An employee paid a severance allowance shall cease to be an employee of the Company and, if rehired, shall be a new employee but have no rights under this provision based upon his service ante-dating receipt of his Severance Allowance.

(e) Should the operation at any location be transferred permanently to a new or existing plant the available jobs at such plant will not be filled until employees of the affected plant have been given reasonable notice and the opportunity to fill them in accordance with their seniority and to transfer to the new plant. In the case of existing plant the foregoing provision shall be subject to the prior seniority rights, if any, of employees in such plant. Upon moving to the new location employees will be paid such reasonable moving expenses as the Company and the International shall determine. Any such payment to an employee will be deducted from his severance allowance, if any, and the balance of such severance allowance shall be paid if such employee is thereafter permanently laid off or if he thereafter quits within a year.

(f) In case of transfer to a new plant, if permitted under the National Labor Management [sic] Relations Act, that Part of this Agreement relating to the plant affected shall cover such new plant.

(g) The provisions of this Section 13 do not limit discussion between the Union and the Company on questions relating to the effect on Employees of plant or department closings or transfers. To implement such discussion the Company shall appoint one representative and the International one representative to the Committee hereby created to develop answers to the questions raised and, if they don't agree, they shall appoint a third and impartial member to join the Committee as Chairman to resolve such disagreement.

Part VIII, Section 4—

SENIORITY

(a) Seniority shall be based upon length of service with the Employer since the most recent hire.

* * * * * * *

(d) Should it become necessary to lay off employees, they will be laid off in accordance with their plant-wide seniority.

* * * * * * *

(f) Employees with seniority who are laid off shall be recalled in reverse order to that in which they were laid off . . .,

. . . Seniority shall . . . cease under the following conditions: . . . 4. Upon lay off for a period of twelve (12) months or longer.

* * * * * * *

Part I, Section 14—

UNION SECURITY

* * * * * * *

(e) The Company will not interfere with the right of the Employees to become members of the Union and will not discriminate against any Employee because of such Union membership or Union activities."

* * * * * * *

Part I, Section 3—

DISCIPLINE

(a) Employees may be discharged or disciplined only for fair and just cause. . . ."

Part I, Section 15—

DISPUTES

(a) This agreement, which includes all Agreements made part hereof by reference and all Agreements herein referred to, fixes all terms and conditions of employment for the Employees whether or not specifically referred to, provided for or considered by the parties hereto and both the Company and the Union specifically waive any and all rights which each may have to compel the other to bargain collectively during the term of this Agreement to change or add to this Agreement on any subject matter not covered by this Agreement except as provided in Section 16 hereof.

(b) Since complete and adequate remedy is provided by the terms of this Agreement, no alleged or other violation of any provision of this Agreement shall give cause to suspend, invalidate, violate or terminate any part of the Agreement.

* * * * * * *

Part VIII, Section 9—

DISPUTES SETTLEMENT

(c) Any grievance, dispute or misunderstanding which may arise concerning the interpretation or application of the provisions of this Agreement shall be presented. . . .

(d) Upon the request of the Employer or the Union the matter may be submitted to an impartial arbitrator. . . .

* * * * * * *

(f) . . . The arbitrator shall have no power to add to or subtract from or modify any of the terms of this Agreement, or any agreement made supplementary hereto.

STATEMENT OF FACTS—

The facts were developed in two hearing sessions in Dallas, Texas, at a visitation to the Dallas plant, and through submission of additional documentary evidence by express or implied limited motions to re-open the record. The formal hearing sessions were recorded by a Court Reporter in 583 pages of transcript, and witnesses were sworn. Both parties introduced quantities of written and photographic exhibits and filed comprehensive briefs. The first hearing was held on February 28, 1975. At the close of that session both parties rested subject to a visit by the Arbitrator to the Dallas plant on March 5, 1975. At the close of that visitation, the Company attorney indicated an intent to file a motion to reopen the record, whereupon the record was opened for further hearing on March 10, 1975, following presentation on that day of the Company's motion to reopen; the Union's objection to reopening the record was overruled. Both parties filed briefs on May 1, 1975. Additional documentary evidence submitted to the Arbitrator by appropriate letter or motion included copies of the following: (1) the Intervenor's [Teamsters'] Exception to Regional Director's Report on Objections with supporting brief in NLRB Case No. 16-RC-6822 dated March 17, 1975; (2) Decision and Certification of Representative in NLRB Case No. 16-RC-6822, dated May 22, 1975; (3) Collective bargaining contract covering Denison Margarine Plant employees between Company and Local Lodge 2082, International Associations of Machinists, dated June 8, 1975; (4) Notice, dated September 2, 1975, from Company to "Dallas Margarine Plant Employees, members of Teamster Local 767," advising that Dallas plant would close at close of business on October 3, 1975.

The Dallas margarine plant is located in an old brick building on the edge of the central business district of downtown Dallas. The building was old when it was first used to manufacture margarine in the late twenties or early thirties. Its construction

features suggest that it is among the oldest manufacturing plants presently being operated in Dallas. The operation was acquired in 1940 by the Standard Nut Margarine Company of Indianapolis, Indiana. Standard Brands Incorporated acquired Standard Nut in 1943, including the ownership of the Indianapolis margarine plant and a lease of the Dallas margarine plant. Standard Brands (hereinafter called the Company) has never owned the property at the Dallas plant but has leased it from 1943 to the present.

In addition to the Dallas and Denison plants, the Company also operates margarine plants in Oakland, California, Atlanta, Georgia, and Pennsauken, New Jersey. Prior to the building of the Denison plant, the newest plant was the one at Pennsauken, which was built by the Company in 1961 on land owned by the Company, and it is the only one operated non-union.

There are 48 regular employees within the bargaining unit at the Dallas plant. As noted from the seniority list dated January 14, 1975, 3 of these employees have 30 or more years of service, 8 have 20 or more years of service, and 26 have 10 or more years of service. The complete list reads as follows:

Employee	Seniority Date:	Employee	Seniority Date:
J. P. Raulston	9/19/41	G. E. Phillips	9/13/56
W. T. Harrison	6/18/43	T. L. Hennig	9/30/57
G. Boon	10/04/45	H. E. Williams	1/21/58
O. M. Murley	9/16/52	E. Yarbrough	4/08/59
F. J. Gore	11/02/53	F. Weatherall	9/11/59
L. V. Thompson	5/11/55	D. P. Crow	1/04/60
Z. Sherrell	8/30/55	M. M. Van Briggle	1/05/60
W. S. Jenkins	9/21/55	J. R. Brown	10/10/60
R. J. Lerro	1/09/56	F. Steed, Jr.	5/23/61

Employee	Seniority Date:	Employee	Seniority Date:
C. M. Clay	6/18/62	D. Mendoza	7/14/70
A. E. Rose	3/25/63	M. Pinkney	12/03/70
B. R. Dunn	3/26/63	J. B. Guillory	12/14/71
W. F. Manning	11/11/63	E. M. Browne	2/06/73
A. H. Brown	7/06/64	D. F. Richardson	2/06/73
K. Ridlehuber	7/27/64	B. J. Badgett, Jr.	2/26/73
J. C. Chambers	9/07/64	D. Dunn	7/30/73
R. C. Daugherty	6/03/65	H. F. Sangster	8/20/73
N. F. Rogers	7/15/66	T. C. Krase	8/27/73
L. Coleman	9/12/66	H. Simmons, Jr.	8/28/73
J. C. Ball	9/12/66	M. E. Wheeler	10/31/73
J. H. Durden	9/22/69	L. E. Hinton	11/08/73
A. Gonzales	9/30/69	C. A. Attaway	1/24/74
J. L. Thomas	10/06/69	J. P. Keen	9/13/74
J. L. Buckley	12/11/69	I. Anderson	9/13/74

I visited the Dallas plant in the presence of the parties and also studied photographs of the interior of the plant and its equipment and considered extensive testimony about the condition of the plant and equipment. I conclude from such direct observation and evidence that the physical premises are in an extremely run-down condition and that the equipment, with minor exceptions, is quite old—most of it was there 23 years ago when observed by one of the witnesses. There is almost no new equipment in the plant, and what little there is, such as a hot water heater, was installed on a replacement basis to keep the plant operational. This is not to say, however, that the Company has neglected essential maintenance or that the premises are not adequate for the manufacturing operation performed. The record does not reflect the exact size of the plant area, but it is undisputed that the plant is already crowded and that there is no room for addition of more manufacturing lines. There are presently three manufacturing lines at the Dallas

plant: 2 quarter-pound (stick) margarine lines and one whipped (stick) margarine line.

Not only is there no room at the Dallas plant for expansion, there is also the distinct possibility that some of the existing property will be absorbed into the widening of Harwood street on which the plant faces. This fact became known when such widening was included in a city plan published in April, 1971. Donald Williamson, manager of the Dallas plant, obtained the plans when they were released and called them to the attention of Company personnel at the New York headquarters.

The lease agreement covering the Dallas plant was originally dated May 29, 1963. On January 16, 1964, it was amended, and from that time until September 6, 1973, the Company executed three extensions of three years each. The last such term was executed on October 30, 1970. It was during that term that the Company began seeking a new plant site in the vicinity of Dallas. In September, 1972, the Company made inquiries of the Denison Chamber of Commerce concerning a possible site location in Denison, and on October 14, 1973, the Company announced selection of a tract at Denison on Highway 84 just outside of Denison. Site preparation was scheduled for November, 1973, and on December 11, 1973, the property was surveyed by a registered public surveyor. The plant that was subsequently built at this location and formally opened on November 1, 1974. One month prior to announcing the Denison plant site, the Company entered into a letter agreement with the owners of the Dallas plant property in which, for the first time, only a one-year lease was signed. That agreement also provided an option to renew for two additional one year periods. On October 25, 1974, the Company exercised its option, thereby extending the lease for a one year period commencing on February 1, 1975, and terminating on January 31, 1976.

The evidence is overwhelming that the reason the Company built the Denison plant was to replace and expand the production of the Dallas plant. There were many reasons to anticipate the closing of the Dallas plant, including the age of the plant, the age of the equipment, higher utility charges, higher oil freight rates, and the possibility of street construction on Harwood. Despite the Company's efforts during the hearing to treat the opening of the Denison plant separate from the closing of the Dallas plant, the Company's Director of Labor Relations, Byron Hawkins, conceded the linkage between the two events. When asked by the Arbitrator if he knew why the Company decided to build the Denison plant he replied: "The higher costs of freight from the Indianapolis area, the greater penalty that was being paid by trucking down. There was *no room to expand the Dallas plant. The Dallas plant is a leased plant. Not owned. It's an old plant. It's bounded by other buildings, by highways.*" (Emphasis added.) He explained that there were "a number of uncertainties and concerns because of the age of the Dallas plant, very real concerns . . . the marginal nature of the plant, the fact that it does only have three lines of margarine production." Although he stated—erroneously as later evidence showed—that the original design for the Denison plant was to produce only soft margarine, he was careful to point out: "I don't think anyone is in a position to say that quarter-pound margarine will not be produced in Denison with the big new facility. One certainty is involved *because of the age of the [Dallas] equipment, the age of the plant, the highway construction, and a number of other factors, utility costs and so on,* it's entirely possible." It was more than possible. Hawkins, who was the Company's only witness at the first hearing, admitted that he was not a party to decisions regarding the opening and closing of plants and transfer of production facilities; specifically regarding the Denison plant he said that "people in the margarine division and in the grocery products manufacturing division in New York would be the ones to make that decision."

At the second hearing, Robert Olsen, Operation Manager for

the Margarine Division, who was called by the Company as a witness for the limited purpose of describing the efficiency and operating conditions of the Dallas plant in comparison to other Company facilities, supplied additional evidence on cross-examination and on examination by the Arbitrator about the Company's object in opening the Denison plant. He said the "Denison plant is supplying soft products for the same service areas that are supplied by the Dallas quarter-pound, bulk and whipped stick," but such production represented only about 3% of the Company's total margarine production. When questioned as to the efficiency of such a limited operation at such a large plant —the Denison plant has 100,000 square feet of floor space and a present capacity for 9 manufacturing lines only two of which are now being used—he conceded the possibility that at some time in the future there would be a full line of margarine production at Denison. At first he said—again erroneously, in view of the evidence later developed—that "there was no long-range projection as to what was plannned for Denison. It was planned to produce soft products and to relieve the Indianapolis load." But when pressed he admitted that "sometimes in the future, yes, *I'm sure we will*" put in some lines which will duplicate some of the Dallas lines. (Emphasis added.) When asked if this would involve use of Morpak machines of the type used in Dallas, he was able to suggest that Benhil rather than Morpak machines would be used. Such specificity had a basis in fact, as additional evidence later confirmed. Mr. Olsen further linked the Denison and Dallas plants by his description of the common marketing arrangements. The Company's salesmen take orders for products from both plants, and the orders are turned in to the Dallas plant only "and the Dallas plant arranges to either load their products first and then pick the balance up in Denison, or they will contact the Denison plant to load their soft products and finish the loading in Dallas going southbound." He confirmed that in terms of marketing the Denison plant is dependent upon the Dallas plant in this same area, which is primarily the southwest part of the United States, and that as far as the

salesmen are concerned the two plants are virtually operating together. He further stated that if the Dallas plant were closed, he knew of no reason presently why the bulk of the area now served by the Dallas plant would not be served from Denison. Regarding his refusal in February, 1974, to assure the Union that jobs at the Dallas plant would not be eliminated by reason of operations at the Denison plant, which is discussed in detail below, he testified that "eventually" some jobs at the Dallas plant could be eliminated by reason of the Denison plant, and that in his communication to the union at that time he had to take into consideration the possibility of closing the Dallas plant, which closing was "still a possibility."

Mr. Olsen noted two economies associated with the Denison facility as compared with Dallas: (1) the cost of oil was less—this was confirmed by the fact that the major oil suppliers for the company were Anderson-Clayton, whose plant was located ten miles away, and Safeway, whose plant was only two miles away; and (2) the per hour labor cost was lower at the Denison plant than the Dallas plant. Also bearing on the Companys' intentions was Mr. Olsen's responses to questions concerning the cost of the Denison facility. Total acreage, established earlier by a map and Mr. Hawkins' testimony, was 63¾ acres, of which 37 acres was deemed excess and was therefore for sale. The plant of 100,000 square feet of floor space was constructed from the Company's own funds at a cost estimated by Mr. Olsen at three and a half or four million dollars. He indicated an additional one million dollars for cost of equipment, bringing the total investment at Denison to four and a half or five million dollars. Although no figures were introduced to show profit and/or loss at that facility, it is obvious that operation of only two manufacturing lines at such a large and modern facility which has existing capacity for nine lines falls far short of efficient and economical utilization.

In response to a question on redirect examination, Mr. Olsen said that there were no plans to close the Dallas margarine plant, but on cross-examination he explained that although all sorts of possibilities had been discussed, "no definite plans or time table has been set for it;" in any event, however, he said he would possibly not be privy to the final decision nor would he be the one to make the final decision. His response to the Arbitrator's final questions were frank and revealing:

Q. Were you privy to the original decision to open the Denison plant?

A. I was involved in the original planning of the plant premises, the equipment and so forth, the layout.

Q. And in laying out the plant it was laid out so that it could accommodate a full line of margarine production?

A. It was built for expansion, yes, and you could conceivably put everything into it.

Q. And not built for a limited line of just tub margarine?

A. No.

Those answers, though not brought out on direct examination, stand in marked contrast to the Company's efforts at the first hearing to convey the impression that the Denison plant had not been built to produce stick margarine; Olsen's frank answers contradicted the contrary testimony given by Byron Hawkins at the first hearing. Hawkins had stated that "when the Denison margarine plant was first designed it was clearly intended at that time to be a sixth margarine plant *making only soft margarine, only soft margarine.*" (Emphasis added.) He partially modified his position in later testimony but was still at variance with Olsen's answers and with subsequent evidence supplied by Jim Windland, manager of the Denison plant. In Hawkins' later statement he said: "I think at the very outset [Denison] was planned

primarily and perhaps solely as a soft margarine plant. I think before it got very far along the plans were to put—to put a different formulation of quarter-pound margarine into that plant, different formulations than what can be made on the Dallas machines." He acknowledged, however, that he was not really privy to the decision of opening and closing plants and that *he personally did not know what the intent was.*

The intent became crystal clear when Jim Windland finally testified. Mr. Windland was not called as a Company witness; when his testimony was requested by the Union, the Company at first refused to produce him. Later, however, the Company reconsidered, and Mr. Windland drove in from Denison and was called as an adverse witness by the union just prior to the close of the hearing. Before referring to his testimony, however, another statement by Labor Relations Director Hawkins should be noted, for it was an additional statement in the pattern being presented by the Company in order to show a separation between the Denison and the Dallas plants. He testified: "There is no equipment in the Denison plant at this time for the making of molded stick margarine." As will be seen from Mr. Windland's testimony, that statement was not accurate. But the making of the statement is important as corroboration of the Company's intent to conceal the true molded stick margarine capability of the Denison plant.

Denison plant manager Windland testified that *in the original planning, quarter-pound lines were included* "and we had even got to the point of laying out the lines and so forth and it was scrapped." He said those original plans went back to October, 1973, which was the month when the Company formally announced the building of the Denison plant. He testified that the plans were set aside but later revived. There is reason to believe, however, that corporate decision-makers were only postponing execution of the plans, not abandoning them. German-made Benhil machinery for two lines of stick margarine production were actually ordered for delivery to Denison. The exact date of the placing of the order is not known, but Mr. Windland testified that "around nine months to a year" was required for delivery, and delivery of the first line was made in late July or August of 1974. Thus, either a new order for this equipment had been placed in November, 1974, at the latest; or, more likely, the original orders had never been cancelled. Mr. Windland referred to the second plans for installation of these lines and testified: "I've looked at so many plans and many things, but there sticks in my mind a date of somewhere in the latter part of May [1974], but now whether that's on that, on the plans on this second group of plans or whether it's on a revision of some other plans, I really could not definitely say." He went on to say, however, that a full line of Benhil equipment was received and that the parts of that equipment essential for quarter-pound production are still in Denison, though in storage. The facts concerning the concealment of that equipment are detailed below, but before examining those facts and other related events, it is pertinent to ascertain the Company's motive for certain actions it took in connection with the plants in question.

The evidence in the record is clear and convincing that the reason the Company did not promptly carry out its original and ultimate plan to open the Denison plant as a full capacity margarine facility—including production of stick margarine which had been produced at Dallas, thereby transferring all production from Dallas to Denison—was to avoid dealing with the Teamsters Union and avoid application of Section 13(e) of Part I of the Union's collective bargaining contract. That provision requires: "Should the operation at any location be transferred permanently to a *new* . . . plant the available jobs at such plant will not be filled until employees at the affected plant have been given reasonable notice and the opportunity to fill them in accordance with their seniority and to transfer to the new plant." (Emphasis added.) Had such transfer occurred, the entire Dallas collective bargaining agreement would

conceivably have continued to be effective at the new plant under Section 13(f), although such a finding is not necessary to the Award in this case for reasons discussed below. Section 13(f) is pertinent, however, insofar as it sheds light on the Company's motivation.

Evidence bearing on the Company's anti-union motivation is undisputed. The last plant built by the Company, the one at Pennsauken, is non-union. A decision was made at the corporate level that the Denison plant was also to be non-union. Jim Windland understood that intention; he testified in response to a question from the Arbitrator: "All of the plans that I have ever discussed with anyone on the corporate level was to operate the plant non-Union." (Emphasis added). That intent was corroborated by an early statement made by Howard Pines, the Company's Director of Employee Relations. On December 15, 1973, which was shortly after preliminary work on the Denison building site had begun, Mr. Pines told James C. Holden, the Chief Steward of the Union for the Dallas plant, that he knew that the Company was going to attempt to operate the Denison plant "non-union." That statement was made in the presence of the manager of the Company's Dallas yeast plant, Mr. Corbitt. Although the statement was revealed at the first hearing, neither Pines nor Corbitt was called as a witness to dispute its accuracy. It is thus uncontradicted from statements by Windland and Pines that the Company intended the Denison plant to be a non-union operation, and various actions which the Company took can be satisfactorily explained only on the basis of that intent.

The plant itself was built large enough to encompass the present Dallas stick margarine production, in fact the entire Dallas operation including quarter-pound, whipped, and bulk production; and the original plans, including engineering drawings, specifically called for the erection of two manufacturing lines at Denison for production of stick margarine. The latter

lines would have substantially duplicated most if not all of the Dallas operation. A decision was apparently made around October, 1973, to postpone installation of those lines, which may have been at about the time the Company made its decision to operate non-union. If the plant was to operate non-union, introduction of the stick margarine lines would obviously have to be postponed to avoid the initial transfer of union employees from the Dallas plant. Subsequent events established that the original plan to transfer the Dallas operation to Denison was never abandoned—only conveniently postponed. It was the Company's plan that by postponing the transfer of operations, ultimate transfer would be to an *existing* plant rather than to a *new* plant, thereby avoiding—or so the Company hoped—the effect of prior seniority rights which the Dallas employees would have if Denison was treated as a *new* plant under Section 13(f); transfer to an existing plant would limit the Dallas employees to available jobs at the existing plant, "subject to the prior seniority rights, if any, of employees in such plant."

To carry out this policy, the Company told the Union as little as possible and staffed the jobs at the Denison plant without giving employees at the Dallas plant reasonable notice and opportunity to fill them, notwithstanding the requirement of Section 13(3). The opportunity was denied both as to new jobs, such as those on the soft margarine lines, and as to old jobs on the stick margarine lines which were clearly being transferred—though slowly—to the new plant.

As early as November 8, 1973, the Union began its formal efforts to obtain information and arrange a solution to the impending problem. On that day James M. Holden, the Local Union representative, wrote Dallas plant manager D. R. Williams as follows:

> The union has information that Standard Brands Inc. is in the process of building a margarine manufacturing

plant at Denison, Texas. We believe that this plant is being built to replace the one now located in Dallas, Texas. We are concerned about the employees covered by Part VIII of our labor contract. Although the new margarine plant now being built will not open for some time, we feel that it is in our best interest to start negotiating the rights of the Dallas margarine employees under Section 13 of our national agreement immediately.

We would appreciate your answer to this letter as soon as possible.

Shortly thereafter, in the latter part of November, 1973, Mr. Charles Cunningham, a foreman at the Dallas margarine plant, told Holden in a casual lunchroom conversation that there was "no doubt in our mind that they are going to close this thing down." When called as a witness by the Company, Cunningham did not deny having made the statement, but added that he "had not been told the plant was going to close." His statement that the plant would close, which I find that he did make, may have been only his opinion, but because he was a supervisor and because he saw the signs which suggested closing of the Dallas operation in favor of the Denison plant, the statement was probative together with other circumstantial evidence bearing on the Company's intentions. His statement also indicated what may have been a general belief among many employees of the Dallas plant at that time. Notwithstanding, the Company was not in any hurry to respond to the Union's November 8 request for negotiations and information.

The Company had in fact been busy making plans that would have been quite relevant to the Union's inquiry, including the preparation of engineering drawings and the ordering and purchasing of Benhil equipment. Although the Union's request in the Nov. 8th letter for negotiations under Section 13 of the National Agreement (Part I of the Collective bargaining contract) was a request for negotiations and information under the contract, it would also be a request pursuant to Section 8(a)(5) of the National Labor Relations Act (see discussion of *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), hereinbelow).

On December 13, 1973, Holden again wrote Williamson as follows:

This letter is in reference to my letter dated November 8, 1973.

The union still has reason to believe that the opening of a Margarine Plant in Denison, Texas will seriously affect the Dallas Plant. Since you have not seen fit to answer my letter, we feel that the company is avoiding the issue. We are therefore restating our position pertaining to Section 13 of the national agreement. We are also advising you that we fully intend to pursue our rights under this section to the fullest extent that we are capable of doing. We would appreciate your answer as to the Company's position on this matter.

On December 15, 1973, during a discussion about matters relating to the Company's Dallas yeast plant, where Mr. Holden was employed, Mr. Howard Pines, the Company's Director of Employee Relations, told Holden "that *as far as he knew* there would be no loss of jobs or shutdown of this Dallas margarine facility;" however, he said he was only conveying the information as a "messenger" for he was not part of the Margarine Division. When Holden asked him for some assurance regarding these matters, he responded that he "couldn't give . . . any assurance on this thing, that he wasn't part of that division." It was then that he volunteered the information that the Denison plant would attempt to operate non-union.

On December 12, 1973, James C. Paradise, attorney for the Brewery Workers' Conference of the Teamsters Union,

wrote a letter to Howard Pines regarding certain problems requiring prompt consideration and resolution, one of which was "the rights of the Union and the Dallas margarine employees in respect to the new margarine plant in Texas," and requested a meeting "as soon after January 10 as possible."

On December 27, 1973, *seven weeks after the union's request* of November 8, Mr. Pines finally responded to Holden's letters as follows:

> This acknowledges receipt of your letters of November 8 and December 13, 1973.
>
> These letters were answered in the meeting you and I had in Dallas on Saturday, December 15.
>
> Hope you and your family had a nice Christmas, and my very best wishes to you for a happy 1974.

On January 4, 1974, Holden wrote Williamson again:

> To date no answer has been given the local union to our letters concerning the future of the Dallas margarine workers. In previous letters we expressed concern over the new plant being built in Denison, Texas.
>
> I received a letter dated December 27, 1973 signed by Howard Pines. Mr. Pines letter told us exactly nothing. In previous discussion with Mr. Pines I was told verbally that the Denison plant would have no effect on the Dallas plant. Mr. Pines has no connection with the margarine division and was acting as a messenger only. We still believe the Dallas plant will be affected, and insist on negotiations for our right to transfer to the new plant.
>
> I would appreciate an answer to this letter stating the Company's full position on this matter. Verbal reassurance is not enough.

Williamson responded as follows:

> This letter will acknowledge receipt of your letter of January 14, [sic] 1974. As you know, I recently underwent major surgery on my back and I am way behind in my correspondence. I hope you will accept my apology for failing to personally answer your previous letter.
>
> Please be advised that I have asked Mr. Howard Pines to handle your letter and I ask that all future communications on this subject be directed to him. Mr. Pines is being sent a copy of your letter of January 4, 1974.

And on January 23, 1974, Pines wrote Holden:

> Please be advised in regard to your recent letter to Mr. Williamson, I have also received correspondence on the same subject from Mr. James C. Paradise.
>
> A meeting has been set up with Mr. Paradise for January 24, 1974, at which time the Denison and Dallas Margarine situations will be discussed.

The meeting was held on January 24, 1974, the substance of which is reflected in the following correspondence.

On January 28, 1974, Paradise wrote Pines:

> At our meeting at Brewery Workers headquarters in Cincinnati on January 24th we discussed the above plant and its possible effect on the existing margarine plant in Dallas.
>
> I told you that I would submit a number of questions to you in writing and it was agreed that you would give me a written reply. The questions are the following:
>
> 1. What is the expected date for the commencement of production operations at the Denison plant?
>
> 2. What is the date on which you expect to start hiring at the Denison plant?
>
> 3. What products are to be manufactured at that plant?

4. Will any products presently being manufactured at the Dallas Margarine plant be manufactured at Denison?

5. Will any of the operations at the Dallas plant be transferred to Denison, either immediately or in the foreseeable future?

6. Is there any reason to believe that any jobs at the Dallas plant will be eliminated, either immediately or in the foreseeable future, by reason of the operation at the Denison plant?

7. Will equipment be installed in Denison for the manufacture of the same type of margarine as is manufactured at Dallas?

8. Is the Company able to give the Union a firm commitment to the effect that no jobs at Dallas Margarine will be eliminated by reason of the operation of the Denison plant?

I would appreciate a reply at your earliest convenience.

On February 12, 1974, Pines responded to Paradise by enclosing a copy of the following letter from Robert L. Olson, dated February 11, 1974:

INTER-OFFICE CORRESPONDENCE

TO Howard M. Pines Date February 11, 1974

FROM R. L. Olsen OFFICE Groc. Prod. Mfg. Div. Hq.

Subject Denison, Texas Plant

The current situation in the margarine industry is the most volatile we have ever experienced because, in addition to the usual short- and long-term swings in consumer preference, we are also faced with shortages and sharp price increases for corn and soybean oils, and shortages of various packaging materials. Keeping the above uncertainties in mind, following are the questions asked by Mr. Paradise in his January 28 letter to you, and the answers to those questions:

1. What is the expected date for the commencement of production operations at the Denison Plant?
   October 1, 1974

2. What is the date on which you expect to start hiring at the Denison Plant? August 15, 1974

3. What products are to be manufactured at that plant?
   Soft and quarter-pound margarine

4. Will any products presently being manufactured at the Dallas Margarine Plant be manufactured at Denison?
   Yes

5. Will any of the operations at the Dallas Plant be transferred to Denison, either immediately or in the foreseeable future? No

6. Is there any reason to believe that any jobs at the Dallas Plant will be eliminated, either immediately or in the foreseeable future, by reason of the operation at the Denison Plant? No

7. Will equipment be installed in Denison for the manufacture of the same type of margarine as is manufactured at Dallas? Yes

8. Is the company able to give the Union a firm commitment to the effect that no jobs at Dallas Margarine will be eliminated by reason of the operation of the Denison Plant? No

The margarine division fully intends, of course, to abide by the provisions of the Dallas Margarine Plant labor contract.

Robert L. Olsen
Operations Manager
Margarine Division

The Union, however, continued to be suspicious, as indicated by a letter dated March 25, 1974, from Holden to Thomas Rusch, the Union's Director of Organization. But Rusch was then—but not later—inclined to accept Olsen's assurance, saying in his letter of March 27, 1974, to Holden that, based on "reference to the Company's position there will be no transfer and there will be no loss of job, loss of any production or transfer of work out of the plant operations at Dallas, Texas. *If this is true* we do not have an argument with the company." (Emphasis added).

The Dallas employees and the Union representatives were not assured, however; neither Olsen nor any other Company official had disclosed to the Union what was really transpiring in the planning and building of the Denison plant, and the Dallas employees were fully aware of the visible limitations of the Dallas physical plant.

As previously noted, the Company at that very time had an order for delivery to Denison two Benhil lines which could duplicate the Dallas stick margarine production; at the second hearing Olsen confirmed that he was "sure" that the Company at some time would put in lines which would duplicate some of the Dallas lines and that the Denison plant was built so "you could conceivably put everything in it."

Olsen was therefore not being candid with the Union in his letter when he advised that "in the foreseeable future" none of the operations at the Dallas plant will be transferred to Denison. Nor was he being candid when he stated that there was no reason to believe that any jobs at the Dallas plant will be eliminated

"in the foreseeable future, by reason of the operation at the Denison plant."

By May, 1974, as noted previously, the Company either renewed or revised original plans, or else drew a second set of plans, for installation of the two Benhil lines in Denison to produce stick margarine. In August, 1974, arrangements were made for their installation.

At about that same time the Union began to make inquiry of the Company through Dallas attorney James L. Hicks. On August 8, 1974, he wrote R. A. Book, the Company's manager of Employee Relations as follows:

> On behalf of representatives of Teamsters Union 767, please accept this letter as the Union's inquiry regarding future and further plans made by Standard Brands to change operations at the existing Dallas facility. As we have previously discussed, there pends presently a grievance regarding the company's having changed the method of operation for delivery of Standard Brands products. Please advise me if there are any plans to alter in any way the present method of operation at the entire Dallas facility. Although not intended to limit the previous inquiry, we are particularly concerned whether there are plans to sub-contract or contract out any existing functions presently done at the Dallas facility. Further, we wish to know whether there are plans to move any of the existing Dallas functions to the Dennison facility which we understand is presently under construction.
>
> Please respond to this inquiry as soon as possible so that if necessary we can begin implementation of our contractual rights and negotiation of the impact upon potentially separated workers.

Mr. Book did not reply until August 28, 1973, advising that the "Company has made the union aware of any planned

changes *to the best of my knowledge,*" (Emphasis added) indicating that the matter was not in his area of responsibility.

Prior to Mr. Book's reply, Holden had written Pines on August 16, 1974, and on the same day Union director of Organization Rusch also wrote Byron Hawkins, the Company's Director of Labor Relations. Holden write Pines as follows:

> This letter is in regard to the Margarine Plant now under construction in Denison, Texas.
>
> The employees of the Dallas Texas Margarine Plant are demanding to know what their status will be in relation to the Denison plant. Will the Dallas plant be closed? Will our people be given an opportunity to transfer to the new plant pursuant to Section 13 of Part I? We feel we are entitled to answers to these questions before the opening of the Denison, Texas Plant. If we are not given written answers to these questions we will take whatever action necessary to assure the people in the Dallas plant of their rights.
>
> It is the opinion of the union that the company intends to close the Dallas plant and will attempt to deny our people their rights to follow the work.
>
> We would like an answer to our questions immediately. Time is growing short, since the Denison plant is scheduled to open October 1, 1974. We are also demanding full union recognition for the Denison plant.

Rusch's letter to Hawkins of the same date covered four subjects, and including the following:

> Dallas, Texas—Margarine—December 21, 1973—National Agreement Sections 13 E and 13 F and Part VIII.
>
> New Margarine Plant—Denison, Texas, which leaves no doubt this new margarine plant will effect the employment status and create undue hardship for the Dallas employees and members of our Union. Dallas Local Union requested negotiations for the transfer employment rights, etc., including recognition December 21, 1973.
>
> It is very obvious that the Company representatives in all four situations have been stalling. They have not bargained in good faith in the phasing out of the department closing (Peekskill, New York) or the new plants being built in Dayton, New Jersey or Denison, Texas.
>
> We will not accept the continuous stalling tactics. We insist on a settlement on all four problems.
>
> Our Local Unions have made proposals to resolve some of these issues and we get answers from Company representatives in the negative. Therefore, I am recommending to our attorneys immediate action for Unfair Labor Practice Charges.
>
> I think we have been more than patient, spent hours upon hours getting no place on all four issues. It is about time we clear up these important subject matters. I am submitting a copy of this letter to our Brewery and Soft Drink Conference, I.B.T. and the International Brotherhood of Teamsters (Washington, D. C.) for their review; my recommendations may not be to your liking, but our patience (members and Officers) are at an end.
>
> Awaiting your response for action.

Notwithstanding that very little time remained before the Denison plant would open, there was no prompt reply to either letter. The plant itself had been completed, and equipment installation was scheduled for completion on October 15, with production to begin thereafter. A flurry of activity relevant to the concerns of the Dallas employees had in fact been occurring in Denison since May and was now ready for completion. That

activity related to the planned installation of the two Benhil stick margarine lines and the Company's efforts to conceal the equipment and plans from the Union.

Bids had been let for the installation of those lines and, according to Mr. Windland's testimony, the bidding closed the latter part of August. Meanwhile, all of the machinery for one of the Benhil lines had actually been delivered to the plant and placed in the production area.

Thus, at the very time that equipment which would duplicate the Dallas operation was being delivered and scheduled for installation, the Company was receiving strong and persistent requests from the Union for information and negotiations. Although the Union was entitled to have such information as discussed hereinbelow regarding contractual and National Labor Relations Act requirements, the Company's response was to play for time. The Company evidently decided to postpone installation of the Benhil lines until after the plant was staffed with new employees for production of soft margarine, a product which was not being produced at the Dallas plant. In this manner, the Company undoubtedly hoped to carry out its intention of operating the Denison plant non-union. While the Union was being stalled by delays in responding to correspondence and by providing no new information when letters were finally answered, the Company was busy covering up the tracks of the Benhil activity. The Union's final communication in August surely must have reinforced the Company in its resolve to postpone the stick margarine lines, or it may even have been the final factor in that decision. On August 27, 1974, Holden wrote Pines as follows:

> The union is demanding recognition and job rights for all laid off employees of the Dallas Margarine Plant.
>
> We are demanding that these employees be employed at the Denison, Texas Margarine Plant. Since I have received no answer to my last letter dated August 16, 1974

> we are again demanding follow the work rights for all employees employed at the Dallas Plant. We feel that these employees will be affected adversely by the opening of the Dension, Texas Plant. We are again demanding recognition rights for all our employees.

At about the same time that Holden's letter was received, a top-level decision was made to call a sudden halt to the installation of the Benhil machines. I find that the reason for that decision was the Company's desire to avoid transferring the Dallas employees to Denison and operating the plant with members of Teamsters Union 767. Evidence to that effect was overwhelming; and contrary evidence, particularly as to the manner and timing of the decision was non-existent. The fact that the sudden decision was even made would not have been established in the record except for the fact that the Union succeeded in calling Mr. Windland from Denison as an adverse witness. He testified that the Benhil equipment for one complete line was received at the plant in August or the latter part of July, 1974. This was sufficient equipment for one line of quarter-pound production. Similar equipment for a second line was on order and would presumably have been delivered in time for installation under the engineering contract being let. However, *at the end of August the plan was suddenly "scrapped"*. Mr. Ben Cutrone, then General Manager of the Company's Grocery Products Manufacturing Division, telephoned Windland and told him not to install the Benhil machines. No reason was given. His disposition of the machinery that had already been delivered is highly relevant, however. He asked Windland if the machinery had been uncrated, and when told it was still crated, "He said just move them out in the warehouse and leave them and we'll tell you later what we want to do with them." Later he told Windland to ship the votator (which was an item which could be used in either tub or stick margarine production, as would be true of the other votators that remained in Denison) to Pennsauken, and the remainder of the equipment,

the items essential for stick margarine production, were to be put in storage. Windland complied by storing the items, a Benhil machine and a case packer, in a commercial warehouse. At the time of the second hearing (and presumably at the present time) that equipment was still in storage at a charge of $100 per month. It has been in Denison, unused, for over a year. In view of the fact that the Denison plant has much unused storage space in seven empty lines in the production area, plus much unused space in its warehouse where this machinery was originally moved when the installation was suddenly cancelled, I can only infer, there is no evidence to the contrary, that the Company was trying to keep knowledge of the presence of this equipment from the Union. And because the equipment remains in the Denison area the Company at all times relevant to this grievance has had a current intention of installing the equipment in Denison, the effect of which would have been to displace the Dallas operation. Windland's only explanation for his having removed the items from the plant and having put them into monthly storage at an unnecessary cost was: "Because I was directed by my superiors to *take it out of the plant*, put it into storage and said *we'll tell you what to do with it later.*" (Emphasis added). It is reasonable to infer that the same arrangements would have been made for the second line of Benhil equipment had it been delivered prior to the sudden cancellation of the installation plans at the end of August.

While waiting for official replies to their now urgent requests, the Dallas employees were getting unofficial information which seemed to confirm their fears. In the latter part of August, 1974, Mr. Bill Crow, production foreman at the Dallas margarine plant, told James Holden and Thomas Rusch, "we know that it's going to close, that it's going to affect this plant." He said that "we have talked about it in the office and . . . Don [Williamson] is scared. . . ." The Company called Crow as a witness and he did not deny having made the statements, though he said he was just giving his "own opinion."

I find Crow's remarks probative for to the same reason as foreman Cunningham's. Crow's position was higher than Cunningham's, and he was reporting from discussions "in the office," therefore his remarks carried even greater weight. Since the Company did not call Mr. Cutrone as a witness, his actions and intentions, which evidently were synonymous with the Company's, must be evaluated on the basis of other testimony and overt conduct. Mr. Crow's statement about the effect of the Denison plant and about the Dallas plant closing was true and fully corroborated by other evidence outlined herein. His statement is admissible; the Company's objection to it goes to the weight of the evidence only. Had Mr. Cutrone testified to the contrary, I would have carefully weighed and considered such testimony. The Company, however, called no witness with personal knowledge to explain the key events elicited from Windland's testimony or to provide contrary competent evidence bearing on motive and intent.

On September 4, 1974, Union attorney Hicks wrote Howard Pines, stating substantially what he had previously written to Book.

And at long last, on September 10, Pines responded to Holden's letters (a cryptic acknowledgment had been sent on August 26), but all he said was the following:

> I have reviewed my file, and in response to your recent letters I wish to remind you that I met and discussed the Denison Plant with you on December 8, 1973. Furthermore, Mr. B. T. Hawkins and I met and discussed the Denison Plant with Mr. James Paradise and Mr. Thomas Rusch on January 24, 1974. Subsequently, on January 28, 1974, Mr. Paradise wrote a letter on your behalf, and attached is our response dated February 12, 1974.

Pines thus refused to acquaint the Union with the recent events relating to the Benhil lines, and by referring with finality to discussions which had taken place almost a year earlier, on

December 8, 1973, and January 24, 1974, he was in fact refusing to recognize and bargain with the Union over matters as to which there was a duty to supply information and bargain.

On September 16, 1974, Rusch again wrote Pines regarding the Denison and Dallas margarine plants:

> With reference to the Denison margarine plant, the meeting we had in Cincinnati on January 24, 1974 had no bearing whatsoever as to the settlement of the new margarine plant.
>
> We again raise the question as to whether you are going to live up to Section 13 and its various paragraphs relating to plant closings, departmental shut downs and new plant operations. The statements that you are referring to at our meeting of said date do not excuse you from your obligation to your present employees or laid off employees of the Dallas plant.
>
> I do not care what Mr. Olsen informs you as operating manager of the margarine division, I cannot accept these answers and I will hold you and your company responsible for making whole any loss of wages for any laid off employees of the margarine plant while you are employing employees in the new Denison margarine plant. This also relates to job opportunities for present employees working in your Dallas margarine plant.
>
> Unless you give us a written guarantee that there will be no lay offs in the present margarine plant in Dallas, Texas I will not accept the information Mr. Olsen has given you.

The Company apparently did not reply, for no reply was introduced in evidence. The Company then continued without assistance of the Union or the Dallas employees, to staff the Denison plant. The plant began production in the later part of

October, 1974, and formally opened with appropriate ceremonies on November 1. After production had started, Company officials did meet briefly with Union representatives at the Airport Marina Hotel, at the Dallas-Ft. Worth Regional Airport. The meeting was evidently timed to coincide with attendance of the Company officials at the plant-opening ceremonies in Denison the following day. The Company was represented by Labor Relations Director Hawkins and Thomas Scully, Jr., Director of Employee Relations, Grocery Products Manufacturing Division. The Union was represented by Holden, Busch, John Hoe (of the Brewery Workers Conference), Ray Hilsheimer, President and Business Agent of Local 767, and Charles Moore, Business Representative of Local 767. The Union asked for some assurance that the people in Dallas would not be affected by the Denison operation, specifically long-term assurance was requested. Nothing came out of that meeting. The Company officials merely stated that they "*knew* of no plans to close the Dallas margarine plant *at that time.*" Mr. Hawkins also made the statement that he was opposed to even one man transferring from Dallas to Denison, a remark which was occasioned by the fact that one Dallas employee, Ray Daugherty, had attempted to transfer to or be hired at Denison. Over a month later, on December 3, Mr. Olsen wrote Daugherty refusing the request, giving as his reason the fact that on November 21, 1974, the union had filed its formal grievance. Daugherty's request, however, had been pending since May 31, 1974.

The events which followed seemed anti-climatic, for the Company by now had succeeded in keeping the Teamsters Union and the Dallas employees out of the Denison plant and had also avoided giving them accurate information bearing on the future of the Dallas operation and providing the "reasonable notice and opportunity" required in Article 13(e) for the Dallas employees to fill the replacement jobs which had already been planned for Denison. The time for reasonable notice and opportunity had thus passed.

On November 15, 1974, Holden wrote Williamson requesting transfer rights to Denison for 30 employees whose names were attached, and on November 21, 1974, the Union filed its formal grievance and also resubmitted the 30 names stating: "The union is requesting transfer rights for these people and *any other employees at the Dallas plant who wish to transfer to the Denison plant* unless you can give us a firm answer that the Dallas employees will not be affected." (Emphasis added.) Accordingly, transfer rights, if applicable, would not be limited to the 30 employees who signed the petition attached to Holden's letter of November 15. The Union was bargaining agent for all of the employees in the unit and its request and the "class action" type request of the 30 named individuals was more than sufficient to be applicable to all Dallas employees who desire transfer.

The Company's position has remained inflexible, with the only change being that it now places some reliance on the fact that on May 22, 1975, an N.L.R.B. Certification of Bargaining Representative was issued to the International Association of Machinists and Aerospace Workers, District 126, AFL-CIO (hereinafter called IAM) for a production and maintenance unit at the Denison facility. The record reflects that the IAM petitioned for an election on December 6, 1974, and on December 20 the IAM and the Company, over the Teamsters' objections, waived a hearing and entered into an agreement for Stipulation for Certification upon Consent Election, with the election set for January 23. The NLRB conducted the election and subsequent proceedings without benefit of an evidentiary hearing, relying administratively on unsworn representations from the Company that "the Denison plant is fully staffed," although it only had 26 employees and several major manufacturing lines were yet to be started up. Had the Board had the benefit of the information contained in this arbitration record, it is quite likely that it would have refused to hold the election among such an insufficient and unrepresentative contingent of employees, and it is conceivable

—perhaps even likely (since I have the benefit of this evidentiary record and some hindsight) that the contract-bar doctrine would have been applied—based on the Denison plant being simply a new and enlarged version of the Dallas plant that was already under contract with the Union herein. The representational egg has been scrambled, however, and it is not my province to unscramble it. All of the rights which I find herein are based upon the Company's breaches of contract which occurred prior to the filing of the IAM's petition.

Notwithstanding its original intention to operate the Denison plant non-union, the IAM petition and its not-surprising victory in the election (which the Company apparently did nothing to discourage since the Dallas employees were not allowed to vote) seemed useful and perhaps even welcome to the Company. (But I make no such finding, for the Company attitude toward the IAM or the election has no bearing on this case.) The Company has tried to obtain some legal advantage from the IAM certification. Certification was issued on May 22, 1975, and the Company and the IAM quickly reached an agreement on a contract dated June 8, 1975. The wage rates in that agreement appear to be significantly lower than comparable rates in the Dallas Teamster agreement, although I make no absolute finding to that effect. The point is relevant only to show a possible economic advantage to the Company in not dealing with the incumbent Dallas Union.

On September 2, 1975, the Company finally announced the closing of the Dallas margarine plant. The notice said operations would cease at the close of business on October 3, 1975. The Union sought to reopen the record, but this was opposed by the Company. The record was reopened for the limited purpose of receiving the notice, which reads as follows:

September 2, 1975

To: DALLAS MARGARINE PLANT EMPLOYEES
MEMBERS OF TEAMSTER LOCAL 767

We regretfully must inform you of Standard Brands' decision to permanently cease operations at the Dallas margarine plant at the close of business on October 3, 1975.

Our national margarine sales volume during 1975 is down significantly from 1974 levels. This is a reversal of a pattern of growth that continued for many years. It now appears to be unreasonable to expect any significant improvement in our margarine sales volume and this coupled with our utility service (refrigeration and steam) problems in Dallas force us to the realization that we are no longer able to sustain the Dallas margarine plant.

We have met with your union representatives this morning and have informed them of the necessity for this decision.

We are pleased to be able to inform you, as we informed your representatives, that we are able to offer all of our regular employees at Dallas margarine the opportunity to transfer to our other margarine plants located in Denison, Texas and Indianapolis, Indiana. These are the plants to which we will be transferring the production presently being performed here at Dallas. Copies of the labor contracts covering production employees at these plants are available upon request.

Employees accepting transfers to either of these two locations who have not completed their vacations, will be given lump sum payments for all unused vacation time.

The Company further recognizes its obligations under Part I, Section 13 of the National Agreement, and has informed your union representatives of its willingness to sit down immediately to discuss these obligations.

On behalf of Standard Brands, we wish to personally thank you for your past service and wish you the best of luck in the future whether or not you elect to remain with the Company.

D. R. Williamson

I make no finding regarding the alleged transfer of work to Indianapolis, for there is no competent evidence to support the Company's self-serving statement to that effect, and the evidence in the record would indicate that such disposition is unlikely. I likewise do not rely on other self-serving statements as to the reason for the closing. The Company does admit transfer of work to Denison, which is supported by the record herein. Having opposed reopening of the record regarding this notice, the Company is not in a position to complain about the absence of a finding concerning Indianapolis. I do find that the record indicates there is no reason—unless it be motivated by an anti-union desire to avoid the effect of Section 13(e)—to transfer Dallas production anywhere except Denison.

CONCLUSION

I have purposely set out most of the material facts in some detail, for the evidentiary basis for the conclusions herein should be fully understood. I find and hold that the Company has violated the collective bargaining contract in several major respects. Accordingly the grievance will be sustained.

The Company had an obligation under the contract and under the law to recognize the Union and deal with it in good faith regarding disputes for which the contract provides remedial procedures. The failure to deal openly with the union, the failure to provide honest and necessary information as to the Company's intentions and plans for the Dallas plant and the effect which the Denison plant would have on the employment status of the Dallas employees, the unexcused delays in re-

sponding to the Union's requests, and the Company's refusal to engage in meaningful negotiations, constituted violations of Part VIII, Section 1 of the contract. The standard for dealing with the Union under that clause, except insofar as the contract specifically forecloses dealing, which would not be the case here, is comparable to that required under Section 8(a)(5) of the National Labor Relations Act. This construction is reinforced by Part I, Section 15(b) of the contract, which stresses that "complete and adequate remedy is provided by the terms of this Agreement."

Had the Company dealt openly with the Union and provided accurate information instead of we-have-no-plans-at-this-time responses—adequate and honest disclosures being required under the law (see the United States Supreme Court decision in *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *cf. NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956)—it is reasonable to assume that the parties would have negotiated and resolved their differences while protecting job and contract rights which the Dallas employees had accumulated, some for more than 30 years.

The naive approach which the Company asks the Arbitrator to apply to Section 13 would make a mockery of the substantial rights which the Union negotiated for the employees in Section 13(e). The Company contended through witnesses and counsel that if a plant was in existence, even though new, a transfer of work to it from another plant only required notice under Section 13(a) and no carrying of preferential job rights by the transferring employees. The plain meaning of Section 13(e) cannot be so easily manipulated. Transfer of work "permanently" to a "new" plant refers to an opening and closing, but it is unrealistic to require that the opening and closing occur at exactly the same time. It is sufficient that the Denison plant was built as a replacement for and an expansion of the Dallas plant, and the evidence so indicates. Even if the Company had delayed introducing stick margarine lines into the

new plant for good faith reasons, which I do not find to be the case here, the Dallas employees would still have rights, within a reasonable period of time, to have Denison treated as a new operation rather than an existing operation. Otherwise the protective language of Section 13(e) would be rendered meaningless, dependent either on the convenience of the Company or the fortuitous circumstances that opening and closing days would occur simultaneously. I therefore find that the Company violated Section 13(e) by not giving the Dallas employees reasonable notice and the opportunity to fill jobs at the Denison plant. The contract may be read as referring to the entire *operation* at Denison, including jobs which the Dallas employees had not previously performed. However, since there are already employees assigned to those jobs and neither they nor the IAM participated in this proceeding, I do not make a finding in this case that the Dallas employees have a right to displace any employee presently engaged in soft-margarine or closely related operations at the Denison plant; this finding will be without prejudice to a construction of Section 13(e) in some other fact situation. But unquestionably the Dallas employees have rights to perform jobs in stick and bulk margarine manufacture and related operations of the type being performed at Dallas. Operation of both Benhil and Morpak equipment would be of that type.

The Company also violated Section 8(f), for the contract contemplated good faith negotiations as to transfer and plant closing problems, and such negotiations were foreclosed by the Company positions and actions.

Perhaps at the root of the problem is the Company's violation of Part I, Section 14(e), which I find to have occurred in that the Company discriminated against the Dallas employees because of their Union membership and activities, a violation which would be comparable to an unfair labor practice under Section 8(a)(3) of the N.L.R.A. It was undisputed that the Company intended to operate Denison non-union, and it espe-

cially tried to operate it without the Teamsters Union and its contract. This resulted in discrimination against the Dallas employees who were represented by the Teamsters. To this end, the Company gave false information, concealed information, and even hid equipment, to avoid giving knowledge of what was an established fact—that from the very beginning and at all times material hereto the Denison plant was intended as the successor plant to the Dallas plant, and that its production was intended to duplicate and therefore to displace the Dallas production. I find that but for the Union and its contract, it is unreasonable to infer that on formal opening day, November 1, 1975, at least four lines, including two Benhil stick margarine lines, would have been operating at the Denison plant. The Dallas employees who desire to transfer to Denison are therefore entitled to have their Denison seniority begin on the first working day any production or maintenance employee began work in Denison. The evidence indicates that such day fell in the latter part of October, 1974.

I also find that the seniority provisions of the contract were violated by the Company's actions. I shall not describe these violations in detail, however, because I am not holding the entire collective bargaining contract, with accumulated seniority, applicable to the Denison plant. Such a holding may have been appropriate before the egg was scrambled, but in view of the interest of the present Denison employees and the IAM I make no such holding and provide no such remedy.

AWARD AND REMEDY—

For the reasons outlined above, the Union's grievance is sustained.

What is an appropriate remedy? I have tried to balance the contract rights of the Dallas employees with the interest of the present Denison employees who are wholly innocent in this

proceeding. Had the Company not violated the agreement initially, the Teamster's Union, probably under the same contract, would most likely be the bargaining representative of the Denison employees, who would have been mostly former Dallas employees—the record indicates that most of them would have accepted transfer. I will not so order, however. Nor will I order the Company to displace any present employee. As well as violating other provisions, the Company did violate the contractual counterpart of Section 8(a)(3) of the National Labor Relations Act, for which affected employees would be entitled to be made whole as to their losses. So far, however, there have been no losses; what we are concerned with are future rights and the avoiding of losses. Accordingly, subject to the limitations noted below, I hold that all Dallas employees who desire to transfer may do so and that they will acquire new seniority based upon the first working day at the Denison plant (a day in late October, 1974, as described hereinabove), and their relative positions on the seniority roster (for all Dallas transferees will now have the same seniority date) will be based upon length of service with the Company. The Company will be required to provide suitable employment at the Denison plant, beginning the first regular work day following the termination of their employment at the Dallas plant, to as many of those Dallas transferees as are required for the operation of stick or bulk margarine operations, provided however that such operations shall include at least two lines using Benhil equipment or the equivalent. If additional operations are added, such a [sic] Morpak lines, with or without whipped or bulk margarine production, any Dallas employees not otherwise assigned shall be assigned to these jobs before employment if [sic] offered to anyone else. And if vacancies occur in other production or maintenance jobs at the Denison plants, such jobs are to be filled by Dallas transferees so long as they are available and qualified to do the work. If there are any persons from the Dallas plant desiring to transfer in excess of those required for the aforesaid jobs, such persons shall be placed on a prefer-

ential hiring list and shall have the rights of employees on permanent layoff under the contract herein.

It is recognized that the addition of these several manufacturing lines and newly transferred employees will materially alter the bargaining unit at Denison and that eventually the NLRB will have to determine the resulting questions concerning representation. Until that time, however, the provisions of the present Teamster contract will govern the compensation and other benefits of the employees performing work of the same nature as the Dallas operations. Such contract, however, will not govern any other job in the plant even though such job may be filled by a Dallas transferee, for such job would logically be covered by the IAM contract.

The parties are further required to appoint their representatives under Part I, Section (j) as promptly as possible for the purpose of implementing transfer and related rights provided by Section 13, as interpreted by this Award. I shall retain jurisdiction over the parties and subject matter of this grievance pending compliance with this Award.

POSTSCRIPT—

A personal note. Labor Arbitration usually occurs between parties to a viable collective bargaining relationship, and accordingly the hearing and the awards are tolerable and generally not unpleasant. I would have preferred that this case could have fallen within that norm. I regret the necessity for making sharp and specific findings which touch so closely on fundamental attitudes toward union-management relations. But I felt I had no choice, considering my obligation to the contract, other than to make the findings which were so ineluctably required by the evidence. It is my sincere hope, however, that neither party will seek undue advantage and that both parties

will seek to establish a viable relationship based on mutual trust. I say this without prejudice to the rights of the employees to select any representative of their own choice, but this unsolicited advice should also apply to any union which the employees should choose as their representative.

/s/ Charles J. Morris
Charles J. Morris
Arbitrator

Dallas, Texas

September 20, 1975

DISTRICT COURTS' FINDINGS OF FACT AND CONCLUSIONS OF LAW

Northern District of Texas

(Filed October 16, 1975)

The application for preliminary injunction of General Warehousemen and Helpers, Local 767, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "Teamsters") came on for consideration before the Honorable Robert M. Hill, United States District Judge. Having heard the evidence and arguments and having considered the briefs and stipulations of the parties, the court makes the following findings of fact and conclusions of law.

Findings of Fact

1. The plaintiff is a labor union who seeks to enforce a labor arbitration award rendered pursuant to a collective bargaining agreement between the parties.

2. At the hearing before this court held on Friday, October 10, 1975, the parties stipulated to facts that provide the background for the present action. The stipulation was admitted into evidence as Defendant's Exhibit No.1. The court has considered the facts stipulated therein and adopts them as findings of fact. The stipulation without its exhibits is attached. Also attached is the arbiter's award.

3. A portion of the arbiter's award ordered the company to afford the Dallas transferees, if any, the wages and benefits outlined in the Teamster contract in effect in Dallas until such time as the National Labor Relations Board (hereinafter

"NLRB") could determine "the resulting question concerning representation." (Arbitration Award, page 43).

4. The wage scales in the Dallas Teamsters contract are substantially higher than those in the IAM contract in Denison.

Conclusions of Law

1. The court has jurisdiction of this cause pursuant to the provision of the National Labor Relations Act, 29 U.S.C. § 185.

2. The company has agreed to comply with the arbiter's award with the exception of one provision; therefore, the court limits its consideration to the disputed issue of whether that portion of the arbitration award that gives the Dallas transferees the rights and wages contained in the Dallas Teamster contract is enforceable even though the NLRB has recognized the IAM as the exclusive bargaining agent for the Denison employees in this unit.

3. Before the court can issue injunctive relief the plaintiff must establish the likelihood that it will ultimately prevail on the merits, a requirement which varies with the degree of threatened irreparable harm. *Canal Authority of State of Florida v. Calloway*, 489 F.2d 569 (5th Cir. 1974); *State of Texas v. Seatrain International, S.A.*, 518 F.2d 175 (5th Cir. 1975).

4. To prevail on the merits of this proceeding the plaintiff is obliged to show the arbiter's award was within the scope of his authority.

5. To be within the scope of the arbiter's authority the arbitration award must be firmly based upon the terms and provisions of the collective bargaining agreement. Furthermore, the court is of the opinion that the arbiter exceeds his authority if his award conflicts with the jurisdiction exercised by the NLRB. It is this later requirement upon which plaintiff's application flounders.

6. The arbiter ordered not only that jobs be available to Dallas employees who wished to transfer to similar jobs in the Denison plant but also that the ". . . the provisions of the present Teamster contract will govern the compensation and other benefits of the employees performing work of the same nature as the Dallas operation." (Arbitration Award, page 42). This portion of the arbiter's decision appears to conflict with the NLRB's certification of the International Association of Machinists and Aerospace Workers Union as the exclusive bargaining agent for "all production and maintenance employees employed by the employer at the Denison, Texas facility . . ." (Exhibit No. 9 to stipulation). Pursuant to the certification, IAM and Standard Brands negotiated a contract whose terms are apparently in conflict with the Teamsters contract governing the Dallas employees' rights. Although the court need not now make a final determination that the award does so conflict, enough doubt has been raised to prevent plaintiff from being able to make the requisite showing that it is likely to prevail on the merits.

7. Both sides have urged the applicability of *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964). The court is of the opinion that the *Carey* decision does not dictate the result in this case. The crucial fact here, but not present in either *Carey* or in *International Brotherhood of Firemen and Oilers v. International Association of Machinists*, 338 F.2d 176 (5th Cir. 1964), in the case *sub judice* is that the NLRB has already acted. The controlling issue is whether the arbiter's decision conflicts with the NLRB's decision.

8. The application for a preliminary injunction to enforce the arbitration award should be denied. This determination applies only to the enforceability of the provision dealing with the applicability of the Teamster contract to the Denison employees and does not reflect upon the company's duty to comply with the award in other respects about which there is no present controversy and is without prejudice to the plaintiff's right to seek

injunctive relief from this court should the company fail to comply with the award about which there is no controversy.

9. Employees desiring to work at the defendant's Denison margarine plan shall be required to advise the defendant at least twenty-four (24) hours in advance of the time they desire to report for work so that the defendant may schedule them for work; provided that any individual desiring to transfer to the Denison plant shall make his/her intentions known to the defendant by telephoning either its plant manager, James Windland, or Ellie Priebel at area code 214-465-8901 between 8:00 a.m. and 4:00 p.m. no later than 12:00 noon on Wednesday, October 22, 1975.

10. Any finding of fact deemed a conclusion of law is so adopted and any conclusion of law deemed a finding of fact is so adopted.

Dated this 16th day of October, 1975.

/s/ ROBERT M. HILL
United States District Judge

ORDER

(Filed October 17, 1975)

On this date came on for hearing the application of General Warehousemen and Helpers, Local 767, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America for a preliminary injunction and the Court, having heard the arguments and evidence, and having considered the briefs and stipulations of the parties, is of the opinion that the requested relief must be denied. It is, therefore,

Ordered, that the application of General Warehousemen and Helpers, Local 767, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America be, and the same is, hereby denied.

Signed and Entered this 17th day of October, 1975.

/s/ ROBERT M. HILL
Judge

DISTRICT COURT OPINION AND JUDGMENT

Order

(Filed February 18, 1976)

This action came on for hearing before the court on January 25, 1976, the Honorable Robert M. Hill, United States District Judge, presiding. Earlier hearings in this matter on plaintiff's motion for a preliminary injunction were held on September 3, 1975, and October 11, 1975. Pursuant to Rule 65(a)(2) F.R.C.P. the court has considered the transcript of those hearings and the evidence admitted at that time. After consideration of all the evidence and the arguments of counsel, the court is of the opinion that the court's findings, filed October 16, 1975, after the hearing on the preliminary injunction, are correct and are hereby adopted as the court's findings in this cause as amended or supplemented by the additional findings that follow.

It is necessary to deal first with defendant's motion to dismiss. The court is of the opinion that the motion should be overruled. Defendant asserts three grounds for its motion. First, defendant argues that the matters asserted by plaintiff are within the primary jurisdiction of the National Labor Relations Board. Plaintiff seeks to enforce an arbitration award rendered in its favor by Charles J. Morris who found that the defendant violated its collective bargaining agreement with the plaintiff when it moved a margarine manufacturing facility from Dallas to Denison. It must be noted that the arbiter found defendant's conduct to be an egregious and willful violation of the contract. Although the NLRB has been involved in matters related to this case and although the possible conflict between that agency's rulings and the arbiter's award is at the nub of the dilemma in this case, the court is of the opinion that the question of whether

to enforce the award is one that is properly before the court and not within the NLRB's primary jurisdiction. Similarly, the court is of the opinion that this precise issue was not properly before the NLRB at a previous time, and therefore the defendant's contentions that principles of *res judicata* bar plaintiff's cause are without merit.

The third ground for dismissal is the plaintiff's failure to join the International Association of Machinists (IAM), the union certified to represent the Denison plant employees. Although the joinder issue in this case is troublesome, the court is of the opinion that under the unusual circumstances presented the IAM or the Denison employees were not indispensable parties so as to require dismissal of this cause.

Findings of Fact

The court makes these additional findings of fact:

1. One employee from the Dallas plant transferred to Denison and is working under the IAM contract. Other Dallas employees are still available and ready to transfer if the Dallas wages and benefits were in effect.

Conclusions of Law

The court is of the opinion that the arbiter exceeded the scope of his authority since his award is in conflict with the NLRB's certification of the IAM in Denison. Plaintiff argues that it does not contest the certification and that the arbiter's award was a proper contract remedy for violation of the collective bargaining agreement, but the plaintiff's view of the effect of certification is too narrow. The arbiter clearly recognized that his award would lead to employee frictions that the NLRB would oversee. It would have been proper for the arbiter

to order the company to pay money damages or to require the defendant to hire the Dallas employees, but he took the further step of specifying wages and working conditions *after* the NLRB had certified the IAM as the exclusive bargaining agent for the Denison unit. That certification has now withstood an appeal to the NLRB. It is the court's opinion that the arbiter's action in this regard conflicts with NLRB certification; therefore, the award cannot be enforced. Since the award is not enforceable the plaintiff is not entitled to damages, if any were sustained, for the defendant's failure to comply with the order.

The court is not unmoved by the employees' situation. As noted previously, the arbiter found a willful pattern of conduct on the company's part to deprive the Dallas employees of their rights and benefits pursuant to the Teamster's contract. The court is not at liberty to retry the matters before the arbiter and has accepted his findings. The court does not condone the company's conduct. There are nevertheless inherent problems with the award fashioned by the arbiter that make it impossible to enforce without impinging upon the NLRB's jurisdiction.

Dated this 18th day of February, 1976.

/s/ ROBERT M. HILL
United States District Judge

In the United States District Court
For the Northern District of Texas
Dallas Division

General Warehousemen and Helpers, Local 767, Affiliated With International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America,
Plaintiff,

v.

Standard Brands, Inc.,
Defendant.

Civil Action
No. CA-3-75-1216-D

JUDGMENT

(Filed February 18, 1976)

This action came on for trial before the court, the Honorable Robert M. Hill, United States District Judge, presiding. The issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff's request for injunctive relief be denied, that the plaintiff take nothing on its damage claims, that the action be dismissed on the merits, and that the defendant Standard Brands, Inc., recover of plaintiff General Warehousemen and Helpers, Local 767, its costs of action.

Dated this 18th day of February, 1976.

/s/ ROBERT M. HILL
United States District Judge

General Warehousemen and Helpers, Local 767, Affiliated With International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Plaintiff-Appellant,

v.

Standard Brands, Inc.,
Defendant-Appellee.

General Warehousemen and Helpers, Local 767, Affiliated With International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Plaintiffs-Appellants-Cross Appellees,

v.

Standard Brands, Inc.,
Defendant-Appellee-Cross Appellant.

Nos. 75-3797, 76-1579

United States Court of Appeals
Fifth Circuit

October 11, 1977

Rehearing En Banc Granted

December 15, 1977

Before TUTTLE, WISDOM and COLEMAN, Circuit Judges.

TUTTLE, Circuit Judge:

This case requires us to sound the treacherous waters in which judicial power and NLRB authority overlap and some-

times conflict. Appellant, a Teamsters local, seeks to enforce an arbitration award in its favor. Ordinarily, such awards are readily enforced. But the district court held that this award conflicted with a prior NLRB decision and hence could not be ordered into effect. The Teamsters have appealed; Standard Brands, the employer, has cross-appealed, asserting additional bases for refusing to enforce the award.

I. THE HISTORY OF THE CASE

Our perception of this case is inescapably—and properly—influenced by the facts. Certain background points are not controversial. On October 3, 1975, Standard Brands permanently closed its Dallas margarine plant, which it had operated since as early as 1943. In the early 1970s, Standard had begun looking for a new plant site in the Dallas vicinity, and in 1973 it selected a tract of land in Denison, Texas—some 75 miles from Dallas. According to the arbitrator, the new plant went into operation in late October 1974 and formally opened on November 1, 1974.

On the day the plant opened, the Teamsters, who represented the employees of the Dallas plant, filed a grievance which asserted that the operation of the new plant would result in the closing of the old one, and sought to protect the contractual rights of the Dallas employees in that event. The arbitrator did not reach a decision in the case until shortly after the company announced the closing of the Dallas plant, an event which surely influenced his view of the case. He concluded that the Company had

> discriminated against the Dallas employees because of their Teamsters Union membership and activities. . . . It was undisputed that the Company intended to operate Denison non-union, and it especially tried to operate it without the Teamsters Union and its contract.

This conduct violated a non-discrimination clause of the Contract (Part I, Section 14(e)). In the arbitrator's judgment, the company's conduct also violated the Dallas employees' right to reasonable notice and an opportunity to fill jobs at the Denison plant when their work was transferred there (Part I, Section 13(e) of the Contract); and failed to comport with the contractual recognition of the Teamsters as the Dallas bargaining agent (Part VIII, Section 1).

These findings convinced the arbitrator of the necessity for a thoroughgoing remedy. His award had several features: (1) Dallas employees were ensured a right to transfer to certain jobs in Denison; (2) the transferees to Denison were given "super-seniority," based on the first day of Denison operations rather than the first day of their work in the new plant; (3) the former Dallas workers' "compensation and other benefits" at Denison would conform to the Dallas contract.[1] This third element, the introduction of the Dallas contract terms to govern Denison work, was not to be permanent. The arbitrator believed that the addition of these several manufacturing lines[2] and newly transferred employees would materially alter the bargaining unit at Denison and . . . eventually the NLRB will have to determine the resulting conditions concerning representation." The Dallas contract would apply only until that time.

Standard Brands discerns a conflict between this award and an NLRB certification of a different union, the International

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[1] The arbitrator's award can be read to apply the Dallas contract terms even to Denison employees who never worked at Dallas, but who perform work once carried out there. If the arbitrator meant to order any such changes in the terms of non-Dallas employees' work, the Teamsters have not sought to enforce this aspect of his award.

[2] There is some suggestion in the arbitrator's decision that he meant to order the company to begin production in the Denison plant of certain types of margarine, similar to margarine formerly made in Dallas. The parties did not discuss the propriety of such an order and I do not consider it.

Association of Machinists, as the exclusive bargaining agent of the Denison employees. The IAM's organizing campaign had begun as soon as the new plant opened. Within a short time, on December 6, 1974, the IAM was able to file an election petition with the NLRB. The Teamsters were permitted a limited form of intervention in the proceedings on this petition, but the Dallas employees were not allowed to vote in the Denison election. The IAM won the election by a vote of 19 to 4, and, on appeal, the NLRB confirmed the resulting certification of the IAM. In short order, the IAM and Standard Brands reached agreement on a contract of which the arbitrator wrote,

> "The wage rates in that agreement appear to be significantly lower than comparable rates in the Dallas Texas agreement, although I make no absolute finding to that effect."

Although the Teamsters later sought to reopen the representational proceedings on the basis of the arbitrator's findings and award, the NLRB rejected this move.

[1] The district court concluded that the award did conflict with the NLRB certification, and therefore could not be enforced. The court's first action was to deny the union a preliminary injunction enforcing the award.[3] At that time, it was the court's understanding that the company had agreed to comply with all portions of the award except the provision applying the Dallas contract at Denison. Similarly, the district court's final conclusions of law discuss only the impropriety of the arbitrator's attempt to specify wages and working conditions at the Denison plant. It had become clear, however, at the subsequnt hearing on the union's request for a permanent injunction, that the company was also resisting enforcement of the "super-seniority" aspect of the award. Moreover, although the company did offer to let Dallas employees transfer to Denison, it did not offer to pay them according to the Dallas contract. Since the arbitrator's award in effect required the latter, more generous offer, the transfer issue was unresolved as well. The district judge suggested at the permanent injunction hearing that the seniority and transfer issues would only become pressing if our Court reversed on the question of wages. We conclude that all of these elements of the award are still before us.[4]

[3] The union appealed the denial of the preliminary injunction, in No. 75-3796, but concedes that this appeal is now moot.

II. THE COURTS AND THE NLRB: CONFLICT OR OVERLAP

The district court refused to enforce the arbitrator's award on the theory that it conflicted with an NLRB certification. The NLRB, however, had not and still has not declared enforcement of the award to be an unfair labor practice. Thus, the district court of necessity reached its own conclusion about the significance of the certification of the IAM. The principal constraint against such judicial interpretation of the Board's actions is the well-established principle that the Board is the authority primarily responsible for the administration of the National Labor Relations Act. In its broadest terms, this requirement has been seen as precluding original judicial proceedings wherever the conduct under scrutiny is arguably prohibited or permitted by the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959).

[4] Standard Brands contends that the arbitrator's award is itself now moot. The arbitrator expressly indicated that his award of Dallas compensation and other benefits would be effective only until the NLRB dealt with the representational issues generated by his award, and, in Standard Brands' view, the NLRB resolved these questions by adhering to its certification of the IAM even after the arbitrator's opinion had been submitted for its consideration. But the Teamsters correctly point out that the arbitrator contemplated a resolution of representational questions which would arise after compliance with this award. Since compliance with the award has not yet been obtained, mootness is also absent.

[2, 3] This principle, of course, does not mean that the NLRB defines the entire system of law regulating labor relations. Labor relations are commonly also governed by a contract or collective bargaining agreement, and enforcement of these agreements can be carried out by the federal courts under § 301 of the NLRA, 29 U.S.C.A. § 185(a). In particular, courts have the authority to enforce awards entered in contractual arbitration proceedings, even when the conduct under scrutiny could also be the subject of an unfair labor practice charge before the National Labor Relations Board. *See Smith v. Evening News Association*, 371 U.S. 195, 197-98, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 101 n.9, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962). The Supreme Court has given its imprimatur to judicial action under section 301 even in the context of an inter-union "jurisdictional" dispute, which—like the present case—perhaps involved the issue of which union should represent a workforce. *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 84 S.Ct. 401, 11 L.Ed.2d 320 (1964).[5]

[4, 5] So long as the courts exercise this broad power under section 301, they may be asked to enforce arbitration decisions, presumably justified as far as the parties contract is concerned, which violate the National Labor Relations Act. It is clear that a court will not enforce an arbitral decision that conflicts with an NLRB decision. *See Carey, supra*, at 272, 84 S.Ct. 401; *New Orleans Typographical Union v. NLRB*, 368 F.2d 755, 767 (5th Cir. 1966). Similarly, courts have declared that a

[5] Standard Brands contends that the dispute before us properly falls within the exclusive or primary jurisdiction of the NLRB. We reject this contention. While there may be section 301 cases where courts should refrain from taking jurisdiction, *see Smith v. Evening News Association, supra* 371 U.S. at 197-98, 83 S.Ct. 267; *cf. United Steelworkers v. American Int'l Aluminum Corp.*, 334 F.2d 147, 153 (5th Cir. 1964), *cert. denied*, 379 U.S. 991, 85 S.Ct. 702, 13 L.Ed.2d 611 (1965), we believe that respect for the NLRB's primary responsibility compels, rather than precludes, decision of this case.

conflict between the promises of a contract and the demands of a statute would preclude ordering arbitration under the contract or enforcement of an arbitration award. *See United Steelworkers v. United States Gypsum Co.*, 492 F.2d 713, 734 (5th Cir. 1974) (claimed violation of 29 U.S.C. § 186(a)); *Associated Milk Dealers, Inc. v. Milk Drivers Local 753*, 422 F.2d 546, 553 (7th Cir. 1970) (arbitration would not be ordered if clause to be interpreted by arbitrator violated antitrust laws); *Nursing Home Union Local 1115 v. Hialeah Convalescent Home*, 348 F.Supp. 405, 411 (S.D.Fla. 1972) (inescapable conflict with national wage-price control policy would be bar to arbitration). *Cf. Todd Shipyards Corp. v. Marine Workers Local 39*, 344 F.2d 107 (2d Cir. 1965) (finding § 301 jurisdiction over employer's suit for declaratory judgment that contract clause violated NLRA, and for injunction against arbitration; injunction denied).

In the case before us, however, there is no facial, indisputable conflict between the arbitrator's award and NLRB action. The NLRB has certified the IAM as the representative of the Denison employees. The arbitrator's award manifests his effort not to create a conflict with this certification. He commented that "The representational egg [at the Denison plant] has been scrambled . . . and it is not my province to unscramble it." (R. 257). Moreover, his provision for compensation and other benefits in accordance with the Dallas contract expressly was to run only until the NLRB dealt with the representational issues generated by his award.

Moreover, the arbitrator's decision has passed one test before the NLRB. Standard Brands, in partial compliance with the award, permitted one Dallas employee to transfer to Denison with "superseniority." On January 20, 1976, the IAM filed an unfair labor practice charge with the NLRB because one of the Denison employees had been "bumped" by this Dallas transferee. The Teamsters intervened. The Machinists, in part to

avoid giving the Teamsters yet another opportunity to attack the Machinists' certification, sought to withdraw the charge.

The NLRB Division of Advice concluded that the Machinists should be permitted to withdraw the charge. One basis for the Division of Advice's reaction was the Machinists' desire to drop the matter. But the Division also commented that "the Employer's actions in transferring a Dallas employee to Dennison [sic] and applying Dallas seniority to him were considered to have been in compliance with, and, therefore, privileged by the arbitration award. . . . [I]t cannot be said that this arbitral award, as modified, unlawfully interferes with the Section 9(a) rights of the Machinists in Dennison." Standard Brands, Inc., 1976-77 CCH NLRB ¶ 20,020 at p. 32,030.

The same NLRB memorandum, however, appears to question the propriety of the award's extension of Dallas contract terms to Denison. The memorandum only approved of the award "as modified"—an apparent reference to the decision by the district court not to enforce the application of the Teamster contract at Denison. Moreover, the Division commented that

> "If the Circuit Court is being asked by the Teamsters to apply other provisions of the Teamster contract to the Dennison employees so that the Machinists' certification rights would be undermined, the Machinists may wish to seek Board intervention. Such a request would be forwarded to the Division of Litigation." *Id.* at n. 8.

Had the Board appeared in our case, its views would have received careful consideration. In *Boire v. International Brotherhood of Teamsters*, 479 F.2d 778 (5th Cir. 1973), we affirmed the grant of an NLRB request for a temporary injunction against any union efforts to secure compliance with an arbitrator's award. We indicated there that such requests should be granted so long as the legal theories advanced to demonstrate the presence of unfair labor practices are not insubstantial or frivolous. *Id.* at 792.

But in *Boire* the party seeking the injunction was the NLRB itself. Unfair labor practice charges (and a unit clarification proceedings dealing with the same dispute) were already before the Board, and its petition for an injunction was based on a statutory provision, 29 U.S.C. § 160(*l*), which enables the NLRB to seek preservation of the status quo while its evaluation of a case is in progress. *Boire, supra,* at 784. It is one thing for a court to refuse to enforce an arbitration award when the NLRB protests that enforcement would impair Board processes. It is another to "protect" the Board's processes when no unfair labor practice charge is presently pending and no request for a stay of enforcement has been heard from the Board.[6]

In the posture of our case, we believe that we should not readily withhold enforcement of an arbitrator's award. To do otherwise would require us to interpret the National Labor Relations Act, a task which ordinarily is best left to the NLRB. We might also further complicate the process by which this case may finally be resolved. If we enforce the award, its inconsistency with the Act can readily be tested in unfair labor practice proceedings. If we do not enforce it, however, the Teamsters cannot obtain relief by demonstrating to the Board that the

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[6] The NLRB has also obtained injunctions barring arbitration under 29 U.S.C. § 160(*l*), which directs the Board to seek injunctive relief where it has reasonable cause to believe there is a violation of, *inter alia*, the "hot cargo" provisions of the NLRA. *See Danielson v. International Org. of Masters, Mates & Pilots,* 521 F.2d 747 (2d Cir. 1975). As in *Boire*, as in *Danielson*, here the NLRB was directly involved in, and adjudicating the merits of a controversy.

The Board also sometimes intervenes in lawsuits which originally were contested only by private parties. *See, e.g., Smith Steel Workers v. A. O. Smith Corp.*, 420 F.2d 1, 6 (7th Cir. 1969); *Teamsters Local 542 v. Ace Enterprises, Inc.*, 332 F.Supp. 36, 38-39 (S.D. Cal. 1971). *See also Central Motor Express, Inc. v. General Drivers Local 89*, 407 F.Supp. 1217 (W.D.Ky. 1975) (postponing enforcement of arbitration award in case NLRB might intervene). In these cases, as in other instances of direct NLRB involvement, the courts are left in no doubt as to the degree and direction of the NLRB's concerns.

company, by failing to comply with the award, is in violation of its contract—for violations of contracts are not necessarily unfair labor practices, and, if not, are not within the Board's purview. *United Steelworkers v. American Int'l Aluminum Corp.*, 334 F.2d 147, 152 (5th Cir. 1964), *cert. denied*, 379 U.S. 991, 85 S.Ct. 702, 13 L.Ed.2d 611 (1965). Most of the original actions for which the union sought relief in the arbitration could have been categorized as unfair labor practices—but the six month statute of limitations on unfair labor practice charges, 29 U.S.C. § 160(b) has presumably already run on them.

III. THE PROPRIETY OF THE AWARD IN THIS CASE

In light of our understanding of the limited judicial role in lawsuits of this sort, we turn to the award in this case.

[6] Two portions of this award are apparently most controversial. The first is the provision for transfer with superseniority; the second is the application of the Dallas compensation and other benefits to Denison work. It seems clear to us, however, that we cannot refuse enforcement of the superseniority portion of the award. The Division of Advice, after all, has already indicated that the grant of superseniority may not be an unfair labor practice at all.

Perhaps there is a critical distinction between the superseniority decision and the use of the Dallas contract to fix Denison compensation. But it can hardly be contended that the superseniority provision is altogether free of impact on the Denison workforce, and thus not at all in tension with the IAM certification. Unions bargain over seniority provisions; they seek, naturally, to maximize the job security and work privileges of those they represent. This goal is frustrated if another group of employees can obtain preferred status. *See generally In re Arbitration Between UAW Local 259 and Kellogg Pontiac Sales*

Corp., 392 F.Supp. 1044 (S.D.N.Y.1975) (refusing to enforce arbitral award which would have granted substantial number of employees right to transfer to new work location pursuant to union's contract, since award conflicted with NLRB decision that contract did not apply to new location, and with election in which union was defeated).

Still, it is evident that the wages provision of the award is at least an additional interference with the exclusive role in bargaining over the terms of Denison employment which the IAM ordinarily would exercise. An influx of Dallas Teamsters, paid at higher rates than their Denison counterparts, surely would cause jealousy and conceivably could undermine the IAM's support. The IAM also might encounter problems in the next round of negotiations, when the inequality in wages might have to be resolved one way or another. *See generally McGuire v. Humble Oil & Refining Co.*, 355 F.2d 352, 357 (2d Cir. 1965).

The district court suggested that the arbitrator could have validly ordered the company to pay damages to the Dallas employees. Such a remedy often would be a happy choice. A lump sum award could, for example, compensate the Dallas employees for the breach of their contract, while leaving intact the terms of the agreement governing Denison. We have approved the payment of damages, based on the breach of an expired contract and awarded in an arbitration conducted at the instance of a decertified union. *United Steel Workers v. United States Gypsum Co.*, 492 F.2d 713 (5th Cir. 1974). *See also United States Gypsum Co. v. United Steel Workers*, 384 F.2d 38 (5th Cir. 1967), *cert. denied*, 389 U.S. 1042, 88 S.Ct. 783, 19 L.Ed.2d 832 (1968). The Second Circuit has also intimated that it could approve a damage award despite an NLRB decision precluding other relief. *Luckenbach Overseas Corp. v. Curran*, 398 F.2d 403, 405-06 (1968); *see In re Arbitration Between UAW Local 259 and Kellogg Pontiac Sales Corp.*, 392 F.Supp. 1044, 1050-51 (S.D.N.Y.1975) (enforcing damages portion of award). The

Ninth Circuit reached a somewhat similar conclusion in *IBEW Local 1547 v. Teamsters Local 959*, 507 F.2d 872, 878-79 (9th Cir. 1974).

Admittedly, the propriety of a damage award is not clearly established. Some doubt might be cast upon it by *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 84 S.Ct. 401, 11 L.Ed.2d 320 (1964). *Carey* upheld the propriety of resort to arbitration to settle a work-assignment or jurisdictional dispute. But Justice Douglas, writing for the Court, observed in *dictum* that:

> "Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301."
> *Id.* at 272, 84 S.Ct. at 409.

Certain subsequent cases have followed the apparent implication of *Carey*, and refused to enforce damage awards where the NLRB had decided the underlying work-assignment dispute. *See Ironworkers Local 395 v. Lake County, Indiana Council of the United Brotherhood of Carpenters*, 347 F. Supp. 1377 (N.D. Ind.1972); *Dock Loaders Local 854 v. W. L. Richeson & Sons, Inc.*, 280 F.Supp. 402 (E.D.La.1968). These cases, however, dealt with situations where the employer could not comply with the arbitrator's assignment of work without violating a specific construction of the National Labor Relations Act by the NLRB. Here, no such square conflict has been demonstrated. Thus, even if employers can escape damage liability when their contractual obligations conflict with statutory duties, a damage award in our case would still be enforceable.

Here, to be sure, the arbitrator awarded wages and other benefits, rather than simply damages. But the distinction between the two in this case could be as much form as substance. At the

time that the arbitrator issued his decision, the Dallas plant was still open. Thus, no damages had been suffered. The potential for damages would arise only if the Dallas employees were denied work in Denison, or were paid less for it than they would have received in Dallas. If their pay was less, the measure of damages for the period of their employment at Denison would be the difference in their wage scales. The arbitrator could have ordered the payment of a lump sum at some time in the future, or the payment at once of an estimate of what that lump sum would be. Instead, he attempted to avoid the need for a damage award by ordering the payment of Dallas wages and compensation. The precise effect of this order is to make the employees whole for any losses they would have suffered. We believe it can fairly be argued, therefore, that if transfer and supersenioriity are proper, and damages are appropriate as well, then the arbitrator's order of wages and other benefits for the transferees in accordance with the Dallas contract also can be squared with the Board's views.[7]

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[7] In taking this stance, we recognize the apparent inconsistency between our approach and that of the Seventh Circuit in *Local 7-210, Oil, Chemical & Atomic Workers v. Union Tank Car Co.*, 475 F.2d 194 (7th Cir. 1973), *cert. denied*, 414 U.S. 875, 94 S.Ct. 68, 38 L.Ed.2d 120 (1973). In that case, an arbitrator had ordered Union Tank Car Company to apply its agreement with the OCAW to certain operations once performed by the OCAW but subsequently transferred to a plant covered by a contract with another union, the Boilermakers. The court denied enforcement.

The court felt, and the OCAW conceded, that an NLRB decision certifying the Boilermakers as exclusive bargaining representatives precluded application of the OCAW contract at the new plant. But the court also declined to enforce the arbitrator's order that the company make the OCAW-represented employees whole for any lost wages or monetary fringe benefits. Apparently the only contract violation which the arbitrators sought to remedy was the failure to apply the OCAW contract to the new operations and the court viewed this violation as immunized by the NLRB decision.

Whatever the philosophical differences between *Local 7-210* and the view we have taken here, the results in that case and our own are not necessarily in conflict. The arbitrator in our case was careful not to seek to impose the entire Dallas contract at Denison, and

[7, 8] The arbitrator's award, then, avoids a clear conflict with the NLRB if it is viewed as essentially a make-whole award. We therefore reject the district court's conclusion that the possibility of interference with the NLRB certification precludes enforcement of the award.[8]

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found a range of contract violations by Standard Brands quite apart from the failure to apply the Dallas contract.

Standard Brands contends that *Sperry Systems Mgmt. Div. v. NLRB*, 492 F.2d 63 (2d Cir. 1974), *cert. denied*, 419 U.S. 831, 95 S.Ct. 55, 42 L.Ed.2d 57 (1976), is also opposed to the result we reach here. In *Sperry*, a union representing a New York unit sought to apply its entire contract, with the exception of the provision for union recognition, to employees in California. The union won an arbitration decision to that effect, but the company asserted that efforts to enforce that decision constituted an unfair labor practice, and the Second Circuit agreed, vacating an NLRB dismissal of the employer's charge. The union had already lost a representation election in California, and the *Sperry* court concluded that the union's efforts to enforce the award amounted to a *sub rosa* attempt to gain the recognition as bargaining agent which the election defeat precluded. The court also declared that the union had no right to bargain over the terms of employment in California. But it expressly recognized that the union could properly have bargained on this subject if the terms of the California employment vitally affected employment in New York.

In no respect is *Sperry Systems* inconsistent with the result we reach. The union here has foresworn any attack on the IAM's certification. Moreover, the consequences of shifting operations from one plant to another obviously do vitally affect the employees of either plant, and bargaining over such a subject seems entirely proper. Indeed, the Teamsters have pointed out, without contradiction, that contractual provisions speaking to such relocations have become very common in American labor relations.

[8] *Standard Brands* directs a volley of other arguments against the validity of the arbitrator's award. We simply cannot accept, however, *Standard Brands'* contention that the award does not draw its essence from the collective bargaining agreement. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). As the Supreme Court observed in *Enterprise, id.*, the arbitrator's informed judgment is particularly important in the formulation of remedies. Nor does the award exceed the scope of the grievance submitted to the arbitrator, for the rather loosely worded grievance neither specified nor restricted the types of relief with which it was concerned. Moreover, this Court has suggested that such disputes over the scope of a submission are themselves to be resolved by the arbitrator. *United Steel Workers v. United States Gypsum Co.*, 492 F.2d 713, 732 (5th Cir. 1974), *citing John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555-59, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964).

We reject as well the company's assertion that the award is void for failure to join an indispensable party, the International Association of Machinists. *Cf. Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 84 S.Ct. 401, 11 L.Ed.2d 320 (1964) (ordering arbitration despite possible absence of one of the disputing unions). The arbitration took place under the Teamsters contract and adjudicated rights between the Teamsters and the company. If the IAM's interests have been seriously damaged, the damage is not irreparable; it can seek relief before the National Labor Relations Board.

IV. REMAND

We remand the case to the district court, however, for its consideration of the scope of the arbitrator's award. Standard Brands has criticized the award for failing to define the "compensation and other benefits" which it accords to the transferring Dallas employees. While we feel that this phrase could readily be interpreted as encompassing wages and monetary fringe benefits, we believe this issue should be addressed first by the district court. If the arbitrator's intent remains unclear, a remand to the arbitrator for clarification would then be proper. *San Antonio Newspaper Guild Local 25 v. San Antonio Light Division*, 481 F.2d 821, 825 (5th Cir. 1973).

A more important ambiguity in the award is its failure to make clear how long the transferring employees are to be paid in accordance with Dallas standards. The award merely says that Dallas standards will apply until the NLRB resolves the questions concerning representation posed by the award. Whether such representational questions would be created by enforcement of the award is not clear. Even if such questions arise, and are resolved in the IAM's favor, the arbitrator's authority to award a make-whole remedy might well be intact. Thus, the minimum and maximum periods of this awards effectiveness are not evi-

dent, at least at this stage of the proceedings.[9] We remand to the district court for it to determine, if possible, the reach of this award, and to granting enforcement only that part of the award which falls within proper limits. While those limits are cloudy, we can observe that we would have difficulty enforcing an award which imposed foreign contract terms on another plant for an indefinite period. On the other hand, we would view an award which made whole the Dallas employees for losses suffered over the term of their contract as entirely proper.

V. CONCLUSION

In rejecting Standard Brand's contention that the award by the arbitrator conflicts with the IAM certification, we, of course, do not mean to constrain the NLRB to reach the same conclusion. But it is our primary duty to provide contractual relief, and the contours of that relief, are normally shaped by arbitrators. This award is not, in our view, squarely in conflict with the IAM's certification. It provides a remedy for a serious breach of contract, and our respect for the integrity of the IAM certification does not justify refusing enforcement.

The case is remanded to the district court for further proceedings not inconsistent with this opinion.

COLEMAN, Circuit Judge, dissenting.

I think the District Court properly applied the applicable standard of judicial review in § 301(a) suits for the enforcement of arbitration awards. The majority opinion approaches this appeal as if it were a question of whether we should withhold enforcement of the award. I believe that the true issue is whether the District Court abused its discretion when it denied enforcement.

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[9] Though the award may be ambiguous, we emphasize that it is not by its own terms moot. *See* note 4 *supra*.

I would affirm the denial of an injunction which would compel the employer to comply with an award obviously in conflict with an existing National Labor Relations Board certification. There is no way of getting around the fact that the National Labor Relations Board certified IAM, not the Teamsters, as the exclusive bargaining agent for the Denison employees, who, incidentally, were not parties to the execution of the Teamsters agreement for an entirely different plant at Dallas.

An NLRB unit clarification takes precedence over an arbiter's award, *Local 7-210, Oil, Chemical & Atomic Workers v. Union Tank Car Company*, 7 Cir., 1973, 475 F.2d 194; *Smith Steel Workers v. A. O. Smith Corporation*, 7 Cir., 1969, 420 F.2d 1; *New Orleans Typographical Union No. 17 v. NLRB*, 5 Cir., 1966, 368 F.2d 755. The majority opinion acknowledges as much but the prescribed result is not in harmony with that acknowledgement.

If the award in this case is enforced, the Teamsters, not the certified IAM, will have negotiated the terms and conditions of employment in Denison. Moreover Standard Brands will be compelled to violate the NLRB directive that it negotiate exclusively with IAM, § 159 of the Act, and as to which the Board is the exclusive authority, *West Point-Pepperell, Inc. v. Textile Workers Union of America, AFL-CIO, CLC*, 5 Cir., 1977, 559 F.2d 304.

Sperry Systems Management Division, Sperry Rand Corporation v. NLRB, 2 Cir., 1974, 492 F.2d 63, was a case in which an employer opened a new plant. The collective bargaining agreement at an older plant provided that the contract there should apply to the company's technical employees wherever located. The arbiter concluded that the agreement's wage and working conditions provision should apply to employees at the new plant. The Second Circuit characterized the union's effort to enforce the award as an attempt to gain *de facto* recognition

as the bargaining agent of the employees at the new plant which it had failed to gain in the certification election. The Court determined that the union's actions were merely attempts to subvert the NLRB order regarding the proper bargaining unit.

That is what is happening here, but in this instance the effort gains the assistance of the Court rather than its repudiation.

Additionally, the arbitration award violates an express provision of the agreement. Part I, § 13(f) provided:

> "In case of transfer to a new plant, *if permitted under the National Labor Management Relations Act*, that part of this Agreement relating to the plant affected shall cover such new plant" (emphasis added).

The arbiter ordered application of that portion of the Dallas contract governing compensation and other benefits to the Dallas transferees at the new Denison plant. Effectuation of this portion of the award would result in an unfair labor practice in violation of § 158(a)(1, 3) of the National Labor Management Relations Act.

The cases are legion holding that an arbitration decision which violates any statute or which is inconsistent with public policy will not be enforced.[1]

If Standard Brands had complied with the arbiter's award, it, in effect, would have negotiated conditions of employment with

[1] *Banyard v. NLRB*, 1974, 164 U.S.App.D.C. 235, 505 F.2d 342; *United Steelworkers v. United States Gypsum Company*, 5 Cir., 1974, 492 F.2d 713, *cert. denied*, 419 U.S. 998, 95 S.Ct. 312, 42 L.Ed.2d 271 (1974); *Ludwig Honold Manufacturing Company v. Fletcher*, 3 Cir., 1969, 405 F.2d 1123; *United States Gypsum Company v. United Steelworkers*, 5 Cir., 1967, 384 F.2d 38, *cert. denied*, 389 U.S. 1042, 88 S.Ct. 783, 19 L.Ed.2d 832 (1963); *Glendale Manufacturing Company v. Local No. 520, International Ladies' Garment Workers' Union*, 4 Cir., 1960, 283 F.2d 936, *cert. denied*, 366 U.S. 950, 81 S.Ct. 1902, 6 L.Ed.2d 1243 (1961).

Teamsters, instead of IAM, although IAM had been chosen and certified as the exclusive bargaining representative of the Denison employees. The conclusion seems inescapable that the Denison employees' right to choose their bargaining representative would thus clearly be infringed, violating § 158(a)(1), *Sperry Systems Management Division, Sperry Rand Corporation v. NLRB*, 2 Cir., 1974, 492 F.2d 63, 70.

According to § 158(a)(1), an employer's attempt "to interfere with, restrain, or coerce employees in the exercise of the [organizational] rights guaranteed in section 157" constitutes an unfair labor practice.

Standard Brands' compliance with the arbiter's decision would also violate § 158(a)(3) and would constitute an unfair labor practice, *Sperry Systems Management Division, Sperry Rand Corporation v. NLRB*, 2 Cir., 1974, 492 F.2d 63. It is "an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," 29 U.S.C., § 158(a)(3). Disparate wage treatment is clearly discriminatory, *Radio Officers' Union of the Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 74 S.Ct. 323, 98 L.Ed. 455 (1954). Paying the Dallas transferees, and the Denison employees performing work of the same nature as the Dallas operation, compensation higher than that paid the remainder of the Denison employees inescapably tends to encourage membership in Teamsters and to discourage membership in IAM.

For all the above reasons, very cogent ones I believe, I must respectfully dissent.

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING
EN BANC

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, and RUBIN, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

COURT OF APPEALS EN BANC OPINION
ON REHEARING SEPT. 1978
ON REHEARING SEPTEMBER 1978

General Warehousemen and Helpers Local 767, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Plaintiff-Appellant,

v.

Standard Brands, Inc.,
Defendant-Appellee.

General Warehousemen and Helpers Local 767, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Plaintiff-Appellant Cross-Appellee,

v.

Standard Brands, Inc., Defendant-Appellee,
Cross-Appellant.

Nos. 75-3797, 76-1579.

United States Court of Appeals,
Fifth Circuit.

Sept. 15, 1978.

Appeals from the United States District Court for the Northern District of Texas.

Before BROWN, Chief Judge, TUTTLE, WISDOM, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, and VANCE, Circuit Judges.

COLEMAN, Circuit Judge.

This suit was brought under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), by a Teamsters local, the appellant here, to enforce an arbitration award. A preliminary injunction was denied by the District Court. The Teamsters appealed that denial, but before we could hear the appeal the District Court reached the merits and denied enforcement of the arbitration award. This, too, was appealed. Standard Brands, Inc., cross-appealed, asserting additional grounds for refusing to enforce the award. The appeals were consolidated. A divided panel of this Court reversed the District Court and ordered enforcement of the award, *General Warehousemen and Helpers Local 767 v. Standard Brands, Inc.*, 5 Cir. 1977, 560 F.2d 700. Rehearing *en banc*, sought by *Standard Brands*, was granted.

The arbitration process was, itself, regular and had been pursued in accordance with the provisions of a collective bargaining agreement. The complication is that the *remedy* prescribed by the arbitrator required the employer to violate the terms of another of its collective bargaining agreements with a bargaining unit duly certified by the National Labor Relations Board.

We affirm the denial of enforcement for the arbitrator's award, but we remand the case for further proceedings not inconsistent herewith.

I. THE FACTUAL BACKGROUND OF THE CASE

The basic facts are not in dispute. Standard Brands manufactures, among other things, margarine. Since at least 1943 it has operated a manufacturing plant in Dallas, Texas. Apparently, this plant was quite old; it had been used by various companies for nearly fifty years. Standard had never owned it,

however, but had operated it under a series of leases. It appears that there was no room for expansion of the three manufacturing lines: two quarter-pound (stick) margarine lines and one whipped (stick) margarine line.

At the outset of this litigation, some 48 Dallas employees of Standard were represented by the Teamsters local. Of this 48, three had over 30 years of service, five others had over 20, and eighteen others had more than 10 years. The Dallas agreement between the Teamsters and Standard, effective for the period May 1, 1973—April 30, 1976, contained provisions protecting the rights of the employees if the Dallas operations should be "transferred permanently to a new or existing plant . . ." The provisions of that contract, which play a crucial role in the disposition of this case are printed in the margin.[1]

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[1] Part VIII, § 1:

> The Company recognizes the Union as the sole and exclusive collective bargaining agent for all production and maintenance employees and laboratory testers at the Company's margarine plant at Dallas, Texas, excluding supervisory, clerical and professional employees.

Part I, § 13:

> (a) Before any plant or department is closed, the Union will, if possible, be given thirty days' prior notice.
>
> * * * * * * *
>
> (e) Should the operation at any location be transferred permanently to a new or existing plant the available jobs at such plant will not be filled until employees of the affected plant have been given reasonable notice and the opportunity to fill them in accordance with their seniority and to transfer to the new plant. In the case of existing plant the foregoing provision shall be subject to the prior seniority rights, if any, of employees in such plant.
>
> . . . . . .
>
> (f) In case of transfer to a new plant, if permitted under the National Labor Management Relations Act, that Part of this Agreement relating to the plant affected shall cover such new plant.
>
> (g) The provisions of this Section 13 do not limit discussion between the Union and the Company on questions relating to

As had been its custom, Standard executed a three-year extension of its lease on the Dallas plant on October 30, 1970. Sometime thereafter, Standard began searching for a new plant site in the Dallas area. The search narrowed to Denison, Texas—some 75 miles away—and on October 14, 1973, Standard announced selection of a tract of land at Denison. Shortly before this announcement, Standard entered into a letter agreement with the owners of the Dallas property for a one-year lease, with an option to renew for two additional one-year periods. On October 25, 1974, Standard exercised the first of its two Dallas options. A week later, November 1, 1974, the Denison plant was formally opened.

The potentially adverse impact of the Denison plant was not lost on the Dallas employees or their union. As early as November 8, 1973, the Teamsters formally began efforts to obtain information from Standard and to arrange a solution to what they perceived to be a serious problem. A long series of letters and a few brief conversations between the Teamsters and Standard produced little more than Standard's disclaimer that it

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the effect on Employees of plant or department closings or transfers. To implement such discussion the Company shall appoint one representative and the International one representative to the Committee hereby created to develop answers to the questions raised and, if they don't agree, they shall appoint a third and impartial member to join the Committee as Chairman to resolve such disagreement.

Part I, § 14:

* * * * * * *

(e) The Company will not interfere with the right of the Employees to become members of the Union and will not discriminate against any Employee because of such Union membership or Union activities.

Part VIII, § 9:

* * * * * * * *

(f) . . . The arbitrator shall have no power to add to or subtract from or modify any of the terms of this Agreement, or any agreement made supplementary hereto.

had any intention of closing the Dallas plant at that time. A more formal letter, propounding questions concerning the future of the Dallas plant, received a response from Standard that operations would not be transferred or eliminated, either immediately or in the near future.

Standard, however, did intend to open some lines to produce quarter-pound stick margarine at Denison. The original plans called for those lines, and machinery was ordered for two lines, with delivery scheduled for the summer of 1974. By the latter part of August, 1974, all of the machinery for one line had been received and stored in the Denison production area, and Standard had closed the bidding for the installation work. For reasons not revealed in the record, the Company suddenly made a decision to store this machinery in a warehouse and not to install it at that time.

The Teamsters, who seemingly had been content with the earlier answers to its specific questions, grew more anxious about the developing situation and, in August, fired off a series of letters to various Standard Brands officials. In one of these letters, dated August 27, the Teamsters demanded that the Dallas employees have job rights at the Denison plant. A brief response by Standard was followed by another letter from the Teamsters dated September 16. Apparently, Standard sent no further response. On the very day that the Denison plant opened, November 1, officials of Standard met with several Teamsters representatives in Dallas and reiterated their lack of knowledge of any plans to close the Dallas plant. On November 15, the Teamsters demanded transfer rights for 30 Dallas employees, but they received no response. Six days later, the Teamsters filed a grievance which asserted that the operation of the new plant would result in the closing of the old one and which sought to protect the contractual rights of the Dallas employees in that event.

The arbitrator, Professor Charles J. Morris, did not hold his first hearing until February 28, 1975, after several other important events had taken place.

At Denison, a second union, the International Association of Machinists, began an organizing campaign as soon as the plant opened. On December 6, 1974, it filed an election petition with the NLRB. Teamster representatives were notified, the NLRB held a hearing at Fort Worth, and all the parties (Standard, the IAM, and the Teamsters) entered into a consent agreement that the Board should conduct an election at the Denison site. The Teamsters appealed, arguing that the Dallas employees should be entitled to vote in that election, but the NLRB on January 14, 1975, ruled that the election should be held. The IAM won the January 23 election by a vote of 19-4, and after a series of Teamster appeals the NLRB ordered on May 22, 1975, that the IAM be certified as the exclusive bargaining agent for the Denison employees. By June 8, Standard and the IAM signed a contract covering the employees in the certified unit. This contract was to expire June 11, 1978.

The arbitrator held two formal hearings in February and March, took extensive testimony, received numerous exhibits and comprehensive briefs, and personally visited the Dallas plant. The arbitrator received appropriate notice of the events detailed in the preceding paragraph, as well as a copy of Standard's September 2, 1975, announcement of its intention to close the Dallas plant effective one month later. Standard claimed that its decision to close the Dallas plant was due to managerial changes, a radical downturn in the sales of margarine, and economic unfeasibility of continued operation at the Dallas plant. On September 20, the arbitrator rendered his decision, sustaining the grievance. He found that in response to the union's requests the company had failed to provide the adequate and honest disclosures that the law required, that Standard had not provided the reasonable notice and opportunity to fill the Denison jobs to which the Dallas employees were contractually entitled, and that Standard had "discriminated against the Dallas employees because of their union membership and activities. . . ."

The arbitrator was convinced that these breaches of the collective bargaining agreement warranted a thoroughgoing remedy, in which he avowedly attempted to balance the rights of the Dallas employees against those of the Denison employees, who, of course, were not parties to the dispute. He refused to order the displacement of any Denison employees. Instead, he ordered that all Dallas employees who desired to transfer be permitted to do so and that Standard provide suitable employment for such transferees on stick or bulk margarine lines (equivalent to the Dallas operations and equipment). In addition, Dallas employees not otherwise assigned were to have first preference for new jobs for which they were qualified. *The transferees were to be given "superseniority", based upon the first day of Denison operations rather than the first day of their work in the new plant,* and they were to receive "compensation and other benefits" under the provisions of the then extant Dallas Teamsters contract.

Standard refused to comply with the literal terms of the award, but it did offer jobs to all its Dallas employees at either the Denison or Indianapolis plants, with wages and benefits to be paid according to the union contracts prevailing at those locations. For the Dallas employees, a transfer to Denison would have meant a significant drop in their wages and benefits, and apparently only one person was willing to accept those conditions.

On October 2, 1975, the Teamsters filed suit seeking enforcement of the arbitration award in its entirety, a preliminary injunction, and "all other and further relief, both at law and in equity, to which the plaintiff may show itself justly entitled". In

addition, the Teamsters sought to reopen the certification proceedings on the basis of the arbitrator's findings and award, but the NLRB rejected this motion on November 13, 1975.

The case comes, then, to be evaluated on the following chronology:

Nov. 1, 1974	The Denison plant is opened.
Nov. 15, 1974	Teamsters demand transfer rights for the Denison employees as per the Dallas contract.
Jan. 23, 1975	IAM wins representation election at Denison.
May 23, 1975	NLRB certifies IAM as the exclusive bargaining agent for the Denison employees.
June 8, 1975	Standard and IAM sign contract.
Sept. 20, 1975	Arbitrator renders decision. Dallas employees granted transfer rights to Denison. Their seniority rights to date from the day the plant opened. To receive compensation and benefits under the Dallas contract.
Oct. 1, 1975	Standard Brands closes the Dallas plant.
Oct. 2, 1975	Teamsters file suit to enforce the award.

II. THE PROCEEDINGS IN THE DISTRICT COURT

The District Court concluded that the arbitrators award conflicted with the NLRB certification and therefore could not be enforced. Earlier, when the Court denied the plaintiffs motion for a preliminary injunction, it was the Court's understanding that the company had agreed to comply with all portions of the award except the provision applying the Dallas contract at Denison. At the subsequent hearing on the motion for a permanent injunction, however, it had become clear that Standard was also resisting enforcement of the "superseniority" aspect of the

award. Standard offered to let the Dallas employees transfer, but at the Denison wage rate. Since the Dallas personnel, with one exception, were unwilling to accept such conditions, the transfer issue remained unresolved. At the permanent injunction hearing the District Judge suggested that the seniority and transfer issues would become pressing only if the wages issue were reversed on appeal. The wages and seniority issues are properly before us and we are of the opinion that Standard should be held to its offer to allow the Dallas employees to transfer.

Because the order of the District Judge has such an important bearing on the issues with which we are confronted and the conclusions at which we have arrived, we quote from the District Judge's conclusions of law at the outset:

> The court is of the opinion that the arbiter exceeded the scope of his authority since his award is in conflict with the NLRB's certification of the IAM in Denison. Plaintiff argues that it does not contest the certification and that the arbiter's award was a proper contract remedy for violation of the collective bargaining agreement, but the plaintiff's view of the effect of certification is too narrow. The arbiter clearly recognized that his award would lead to employee frictions that the NLRB would oversee. It would have been proper for the arbiter to order the company to pay money damages or to require the defendant to hire the Dallas employees, but he took the further step of specifying wages and working conditions *after* the NLRB had certified the IAM as the exclusive bargaining agent for the Denison unit. That certification has now withstood an appeal to the NLRB. It is the court's opinion that the arbiter's action in this regard conflicts with NLRB certification; therefore, the award cannot be enforced. Since the award is not enforceable the plaintiff is not entitled to damages, if any were sustained, for the defendant's failure to comply with the order.

The court is not unmoved by the employees' situation. As noted previously, the arbiter found a willful pattern of conduct on the company's part to deprive the Dallas employees of their rights and benefits pursuant to the Teamster's contract. The court is not at liberty to retry the matters before the arbiter and has accepted his findings. The court does not condone the company's conduct. There are nevertheless inherent problems with the award fashioned by the arbiter that makes it impossible to enforce without impinging upon the NLRBs jurisdiction.

III. STANDARD'S CHALLENGES TO THE JURISDICTION OF THE DISTRICT COURT

A. *Exclusive or primary jurisdiction of the NLRB*

[1] Standard's first attack on the subject matter jurisdiction of the trial court comes by way of its assertion that the NLRB has exclusive and/or primary jurisdiction of the matters in issue. We believe Standard's reliance on such cases as *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), and *Garner v. Teamsters Local Union No. 776*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228 (1953), to be seriously misplaced. Those cases all involved the issue of whether state tribunals had been preempted by the NLRA,[2] not the issue presented in this case of whether federal courts have jurisdiction under § 301 of

[2] Recently, the Supreme Court held that state courts may entertain actions to enforce state trespass laws against picketing which is arguably, but not definitely, prohibited or protected by federal law in *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*, — U.S. —, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978). The Court clarified the *Garmon-Garner* line of cases and refused to find preemption. Even as clarified, these cases do not control the result here.

the NLRA to enforce arbitration awards. A long line of Supreme Court cases has reaffirmed the now-familiar doctrine that federal district courts have "jurisdiction . . . over enforcement suits even though the conduct involved was arguably or would amount to an unfair labor practice within the jurisdiction of the National Labor Relations Board," *Hines v. Anchor Motor Freight*, 424 U.S. 554, 562, 96 S.Ct. 1048, 1055, 47 L.Ed.2d 231 (1976).[3] Such suits are cognizable "because of the evident congressional determination that courts should be free to interpret and enforce collective-bargaining agreements even where that process may involve condemning or permitting conduct arguably subject to the protection or prohibition of the National Labor Relations Act." *Motor Coach Employees v. Lockridge, supra*, 403 U.S. at 300, 91 S.Ct. at 1925.

[3] See also *Sears, Roebuck, supra*, n. 2, — U.S. at — n. 14, 98 S.Ct. 1745; *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 298-300, 91 S.Ct. 1909, 29 L.Ed. 473 (1971); *Carey v. Westinghouse*, 375 U.S. 261, 268, 84 S.Ct. 401, 11 L.Ed.2d 320 (1964); *Smith v. Evening News Ass'n*, 371 U.S. 195, 197-98, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962); *Atkinson v. Sinclair Rfg. Co.*, 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962); *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed. 2d 483 (1962).

Somewhat more relevant to Standard's contention is the case of *South Prairie Construction Company v. Local No. 627*, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976). In that case the court of appeals, on review of an NLRB order holding that two companies were "separate" employers, concluded that those two companies were actually a "single" employer within the meaning of the NLRA and that their employees constituted a single appropriate unit for collective bargaining purposes. The Supreme Court reversed, stating that "the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision 'if not final, is rarely to be disturbed', . . ." *Id.*, at 805, 96 S.Ct. at 1844. The instant case, of course, is not a direct review of such an NLRB decision, but Standard seeks to apply *South Prairie*, saying that enforcement of the arbitrator's award would radically alter the status of the IAM as the certified bargaining representative of its Denison plant employees. Again, this argument does not go to the *jurisdiction* of the district court, but rather to the *merits* of the dispute.

There is no question that the District Court's jurisdiction was properly invoked under 29 U.S.C. § 185(a). The question is whether, and to what extent, the District Court could enforce the arbitration award. This issue, really the focal issue in this case, will be dealt with in Part IV, *infra*, but we conclude that the District Judge properly dealt with this branch of Standard's challenge to its jurisdiction.

B. *The IAM as a party which must be joined if feasible*

Standard's second attack on the District Court's subject matter jurisdiction comes in the form of its defense that the IAM is a party which must be joined under Rule 19(a) of the Federal Rules of Civil Procedure.[4] Standard claims that the IAM has a direct, substantial, pecuniary interest in the instant proceedings and that the IAM's ability to protect that interest would be substantially impaired by a decision to enforce the award of Arbitrator Morris. In addition, Standard claims that it would be subject to a very real and substantial risk of incurring inconsistent obligations to the Teamsters and the IAM. The District Judge found the issue of nonjoinder "troublesome", but he nevertheless

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[4] Fed.R.Civ.P. 19(a):

> (2) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

ruled against Standard on this point (although he did dismiss the complaint on other grounds).

The IAM, as the sole and exclusive bargaining agent for all the Denison production and maintenance employees certainly has a not insubstantial interest in the maintenance of its contractual right, backed by the imprimatur of the NLRB, to bargain with Standard over wages, hours, and working conditions at the Denison plant. To enforce those rights, the IAM can resort to the filing of unfair labor practice charges with the NLRB, or it may resort to the grievance and arbitration machinery specified in its contract with Standard, just as the Teamsters have done in this case pursuant to their contract with Standard at the Dallas plant. Nevertheless, if this Court should hold that the arbitration award in its entirety must be enforced, the IAM surely will have had its ability to protect its interests impaired or impeded, despite the existence of such channels for processing its grievances.

For its part, Standard certainly faces a substantial risk that it will incur inconsistent obligations by reason of a failure to join the IAM. As the arbitrator himself recognized, the NLRB's jurisdiction would likely be invoked if Standard agreed, or was ordered by a court of competent jurisdiction, to abide by the arbitrator's award. Furthermore, the IAM might invoke the arbitration machinery of its contract, with results that are totally unpredictable. Compare *Window Glass Cutters League v. American St. Gobain Corp.*, 3 Cir. 1970, 428 F.2d 353 (action to order arbitration dismissed where refusal to join additional union might leave company subject to conflicting arbitration awards). Despite these serious risks, this Court cannot be blind to the fact that Standard appears to have brought much of this risk upon itself. Standard signed the Teamsters contract granting certain rights to its Dallas employees. It was Standard which erected a new plant 75 miles from Dallas, a plant fully designed

and equipped to handle the same type of operations as its Dallas plant. It was Standard which refused repeated Teamsters requests for information on its intentions with respect to its new plant. It was Standard which agreed to submit the dispute concerning transfer rights to binding arbitration. Finally, it was Standard which then decided to close the Dallas plant and announced that intention before the arbitrator had rendered his decision, all the while asserting that it did not intend to transfer its Dallas operations to Denison. With this pattern of activity laid bare upon the record by the arbitrator's findings, to the admission of which Standard did not object and which the District Judge recognized that he was "not at liberty to retry . . .", there is something anomalous about Standard's assertion that this entire action must be dismissed because *it* may be subject to a risk of incurring inconsistent obligations sometime in the future.

On the other hand, there is reason to suspect the Teamsters' motivation in refusing to make the IAM a party. We are not unmindful of the jealouses and rivalries which exist between unions, particularly in cases such as this where one union stands to gain members at the expense of the other. Throughout the litigation, the Teamsters have asserted that they do not challenge the IAM's certification by the NLRB and that they only seek to enforce the contractual rights of their members. When this suit began, the Dallas bargaining unit was seemingly larger than the Denison unit, so there was an outside chance that the Teamsters, if they could transfer enough of their members to Denison, might eventually become the bargaining representative. This possibility now seems remote. The Denison work force is now considerably larger than it was at the time the initial election was held, and the IAM has presumably signed a new contract with Standard, since the old contract was to expire on June 11, 1978.

As can be seen from the foregoing, this issue of joinder under Rule 19(a) is far from simple, but we think that its resolution

is inextricably linked with what we perceive as the central issue in this case—whether a federal district court can enforce the remedial provisions of an arbitration award which would require the employer to violate the terms of another collective bargaining agreement. Because of the manner in which we resolve this issue, *infra*, we do not reach the Rule 19(a) objection of Standard.[5]

IV. ENFORCEABILITY OF THE ARBITRATION AWARD

The District Court declined enforcement of the arbitrator's award on the ground that to do so would present an irreconcilable conflict with the NLRB's certification of the IAM as the exclusive bargaining agent for the Denison employees. Standard asserts that enforcement would impinge upon the rights of the Denison employees to bargain collectively with respect to rates of pay, wages, hours of employment, and other conditions of employment, as guaranteed them by §§ 7 and 9(a) of the National Labor Relations Act, 29 U.S.C. §§ 157, 159(a).[6] Denison employees would suddenly be paid different (and, most likely, lower) wage rates and benefits for the same work. They

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[5] Standard also asserts that consideration of the claims presented by the Teamsters is barred by the doctrine of *res judicata*. However, it cites no authority for this position and we are unable to find that the question of the enforceability of this arbitration award is barred by any prior judgment rendered by a court of competent jurisdiction, which judgment was final, on the merits, and involved the same cause of action. See *Hall v. Tower Land and Investment Company*, 5 Cir. 1975, 512 F.2d 481.

[6] 29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

would become junior to the transferees from Dallas even though they possessed greater plant seniority than the transferees. The nub of the dispute is that if this Court directs enforcement of the arbitrator's award, it may be affirmatively causing the employer to be ordered to commit an unfair labor practice under 29 U.S.C. § 158(a)(1).[7] This cannot be done.

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29 U.S.C. § 159(a):

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

[7] 29 U.S.C. § 158:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

Under (a)(3) disparate wage treatment for the forbidden purpose of encouraging or discouraging union membership is clearly proscribed. *Radio Officers' Union of Commercial Telegraphers Union v. NLRB,* 347 U.S. 17, 74 S.Ct. 323, 98 L.Ed. 455 (1954). If this Court enforced the arbitrator's award, presumably it would be difficult for the NLRB to find the necessary discriminatory intent on the part of Standard, especially since it has resisted enforcement so vigorously. However, we certainly express no opinion as to whether enforcement of this award in the circumstances of this case would constitute an unfair labor practice in violation of 29 U.S.C. § 158(a)(3). That is a task for the Board.

The starting point of our inquiry is, of course, the seminal decision in *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957), where the Supreme Court held that § 301 authorized the courts to fashion a body of federal common law for the enforcement of collective bargaining agreements and, more specifically, the enforcement of promises to arbitrate. Four years later, in the "Steelworkers Trilogy", the Court further shaped that body of federal common law by endorsing arbitration as the preferred method of settling grievances arising from collective bargaining agreements. *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). In the latter case, the Court specifically addressed the question of a court's proper role in reviewing an arbitrator's interpretation of provisions of a collective bargaining agreement: "his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." 363 U.S. at 597, 80 S.Ct. at 1361. Further, in *Carey v. Westinghouse Electric Corp.,* 375 U.S. 261, 84 S.Ct. 401, 11 L.Ed.2d 320 (1964), a case cited extensively by the parties here, the Court endorsed arbitration as a means to solve either work assignment or representation disputes, even though the NLRB could entertain unfair labor practice charges if the dispute were over representation. The Court also noted that the arbitration procedure must have been fair and the result "not repugnant" to the National Labor Relations Act. 375 U.S. at 271, 84 S.Ct. 401. In addition, if the NLRB were to rule contrary to the arbitrator, the Board's ruling would take precedence. *Id.* at 272, 84 S.Ct. 401. See also *New Orleans Typographical Union v. NLRB,* 5 Cir. 1966, 368 F.2d 755, 767. Presumably, in such a case, the system of "private

law," *Warrior & Gulf Navigation Co., supra,* 363 U.S. at 581, 80 S.Ct. 1347, must yield to the system of public law expressed in the NLRA and administered by the NLRB.

[2, 3] Thus, there *must be*: (1) an agreement to arbitrate and the parties must be covered by that agreement; (2) an award which draws its "essence" from the agreement and does not exceed the scope of the issues presented to the arbitrator; and (3) an award which is not "repugnant" to the NLRA.[8] There is no dispute in this case that item 1 is present; there was a valid, binding agreement which covered both Standard and the Teamsters. Standard claims that the second criterion has not been met, *i.e.*, that the arbitrator's award did not draw its essence from the contract. We think, however, that if the Denison plant had not been organized prior to the award, it would have been readily

[8] Other cases have added slightly to these basic requirements. An award may be vacated where it is shown that there was fraud, partiality or other misconduct on the part of the arbitrator, see, *e.g. Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 201 (1968); or because the award was too vague or ambiguous for enforcement, see, *e.g., United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 599, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); *Bell Aerospace Co., Division of Textron, Inc. v. Local 516, UAW,* 2 Cir. 1974, 500 F.2d 921, 923; *Hanford Atomic Metal Trades Council, AFL-CIO v. General Electric Co.,* 9 Cir. 1965, 353 F.2d 302; or where the award conflicted with the demands of a statute, see *Banyard v. NLRB,* 1974, 164 U.S.App.D.C. 235, 505 F.2d 342 (award authorizing company to violate state law held void as against public policy); *Associated Milk Dealers, Inc. v. Milk Drivers Local 753,* 7 Cir. 1970, 422 F.2d 546, 553 (arbitration would not be ordered if clause to be interpreted violated antitrust laws); *Nursing Home Local 1115 v. Hialeah Convalescent Home,* 348 F.Supp. 405, 411 (S.D.Fla. 1972) (conflicts with national wage-price control policy). Standard argues that the arbitrator's order requiring the payment of "compensation and other benefits" at the Dallas rate to any transferee is too vague to be enforceable. Because we hold that differential benefits cannot be a part of the award, there is no necessity to decide this issue. On the remand, however, the arbitrator should specify the monetary award which he determines to be equivalent to the difference between the benefits paid under the Dallas and Denison contracts.

enforceable in its entirety against Standard. Therefore, we cannot say that the award exceeded the four corners of the contract. Cf. *Local 369, Bakery & Confectionery Workers International Union of America v. Cotton Baking Co., Inc.,* 5 Cir. 1975, 514 F.2d 1235, *cert. denied,* 423 U.S. 1055, 96 S.Ct. 786, 46 L.Ed.2d 644 (1976). Unfortunately for the Teamsters, however, the Denison plant had been organized by the IAM which was then certified as the bargaining agent by the NLRB. This fact, then, narrows the issue to compliance with the third criterion.

We think that the award was "repugnant" to the NLRA and accordingly affirm the District Judge on that point.

[4, 5] The right of employees to bargain collectively is at the heart of our federal policy governing labor management relations. Unions are vitally concerned, and properly so, with their right to bargain over wages, benefits, seniority and working conditions. Section 9(a) of the NLRA expressly recognizes such a right for a union if it is certified by the NLRA. If a contract or an arbitration award conflicts with that policy, the statutory policy must prevail. We think that a contract specifying that an employee transferring to another plant operated by the same employer would continue to receive the same wages and benefits that he received at the old plant, despite the existence of a contract with another union at the new location, would be unenforceable. It necessarily follows that an arbitration award which seeks to achieve the same impermissible result cannot be enforced.

Decisions of three other courts of appeals support this analysis. In *Sperry Systems Management Division, Sperry Rand Corp. v. NLRB,* 2 Cir. 1974, 492 F.2d 63, *cert. denied,* 419 U.S. 831, 95 S.Ct. 55, 42 L.Ed.2d 57 (1976), the Second Circuit was faced with a situation similar to that before us. A union representing a New York unit sought, through arbitration, to have its

entire contract appled to a small unit in California, where three draftsmen performing work similar to that done in New York were receiving lower wages. The arbitrator ordered the application of all terms of the prior contract (except the representation provision) to the new bargaining unit. The company resisted the award and filed a complaint with the NLRB charging that the union's attempt to enforce the award amounted to an unfair labor practice. A divided NLRB dismissed the company's complaint, but the Second Circuit reversed, finding that the union's activities constituted a *sub rosa* attempt to gain recognition as the bargaining agent for the California workers, who had previously rejected that union in an election conducted by the NLRB. Furthermore, the union had "committed an unfair labor practice because the subject of the wages and working conditions of the Vallejo employees was not a permissible subject of bargaining in the New York City unit". 492 F.2d at 69.

The Seventh Circuit reached a similar conclusion in *Local 7-210, Oil, Chemical & Atomic Workers v. Union Tank Car Co.*, 7 Cir. 1973, 475 F.2d 194, *cert. denied*, 414 U.S. 875, 94 S. Ct. 68, 38 L.Ed.2d 120. In that case, an arbitrator had ordered Union Tank Car Co. to apply its agreement with the OCAW to certain operations once performed by the OCAW but subsequently transferred to a plant covered by a contract with another union, the Boilermakers. The court denied enforcement.

The court felt that the NLRB's certification of the Boilermakers as exclusive bargaining agent precluded application of the OCAW contract at the second plant. Finding no breach of contract at all, the court also declined to enforce the arbitrator's order that the company make the OCAW-represented employees whole for any lost wages or monetary fringe benefits.

Finally, the Fourth Circuit in *Glendale Manufacturing Co. v. Local No. 520, ILGWU*, 4 Cir. 1960, 283 F.2d 936, *cert. denied*, 366 U.S. 950, 81 S.Ct. 1902, 6 L.Ed.2d 1243 (1961), refused to enforce an arbitration award ordering the employer to bargain with a decertified, minority union. Judge Haynsworth, writing for the court, concluded that "the employer should not be forced to commit an unfair labor practice by dealing with the union as the representative of the employees". 283 F.2d at 940. The court, however, was not unmoved by the plight of the employees and remanded the case to the arbitrator to fashion a new award, which would not cause the employer to commit an unfair labor practice, and suggested that ordering the employer to negotiate directly with the individual employees might be proper.

We find the reasoning of these cases persuasive. Although the union here has consistently disclaimed any attack on the IAM's certification, its repeated appeals to the NLRB on the certification issue indicate otherwise. In fact, at oral argument, counsel for the Teamsters, perhaps realizing that its position was becoming less tenable, suggested that possibly the best resolution of this case would be to remand to the arbitrator for a determination of lump sum damages.

In its brief, the Teamsters cite authority to indicate that contractual provisions such as those at issue in this case have become a common feature in collective bargaining agreements nationwide. The movement of plants from one location to another, the transfer of functions between plants, and the movement of workers between plants are subjects of vital concern for both labor and management. Employees are interested in continuity of employment, income, and seniority rights. Employers, on the other hand, need flexibility to respond to competitive forces and to increase efficiency. Such agreements are important, perhaps necessary, features of the modern mixed economy and are entitled to be respected. But when one contract conflicts with the overriding statutory policy of the NLRA, it cannot be enforced through specific performance. To do so would, to an unacceptable degree, interfere with the equally important right of other workers

to organize themselves into a union and bargain collectively with their employer.

[6, 7] Therefore, we cannot direct enforcement of the arbitrator's award, but, like the District Judge below, we are "not unmoved by the employees' situation." We also accept the findings of the arbiter and we do not condone the company's conduct. It is noteworthy that Standard itself does not deny the contractual violations; it asserts that *this* award cannot be enforced. We agree, but we are unwilling to agree that the choice is an on-off, all-or-nothing one. In *Lincoln Mills, supra,* the Supreme Court declared that the courts must fashion federal common law from the policy of the national labor laws and that "[t]he range of judicial inventiveness will be determined by the nature of the problem." 353 U.S. at 457, 77 S.Ct. at 918. We believe that that federal common law requires us to vacate the arbitrator's award but it also permits us to remand for the reformulation of an award in damages. See *Glendale Mfg. Co., supra,* 283 F.2d at 940-41.[9] Since, in his award, the arbitrator stated that he

[9] We note that the same result could be reached under the United States Arbitration Act, 9 U.S.C. §§1-14. Section 10(d) provides that the district court may vacate the award "where the arbitrators exceeded their powers", and § 10(e) grants the court discretion to direct a rehearing by the arbitrators "where an award is vacated and the time within which the agreement required the award to be made has not expired . . ." Further, § 11(b) authorizes the court to modify or correct the award "where the arbitrators have awarded upon a matter not submitted to them . . ."

Some doubt as to the applicability of the Arbitration Act to disputes arising from collective bargaining agreements was created by the Supreme Court in its decisions in *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957), and *General Electric Co. v. Local 205, United Electrical Workers,* 353 U.S. 547, 77 S.Ct. 921, 1 L.Ed.2d 1028 (1957). The majority opinions did not discuss the applicability of the Act, but Justice Frankfurter in dissent regarded the majority opinions as implicitly rejecting "the availability of the Federal Arbitration Act to enforce arbitration clauses in collective bargaining agreements . . ." 353 U.S. at 466, 77 S.Ct. at 926.

The Supreme Court has not ruled on the issue since the *Lincoln Mills* case, however, and the courts of appeals have charted an uneven path. One immediate difficulty is created by the Act's injunction that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Most of the appellate courts which have dealt with this issue have limited this provision to those cases where the union or the employer is actually engaged in the transportation industry. See, *e.g., Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. General Electric Co.,* 2 Cir. 1969, 406 F.2d 1046. At least three circuits, the Second, Sixth and Seventh, have expressly held the Act applicable to suits involving the arbitration of collective bargaining disputes. See *Bell Aerospace Co. Division of Textron, Inc. v. Local 516, UAW,* 2 Cir. 1974, 500 F.2d 921, 923; *Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. General Electric Co., supra; American Broadcasting Companies, Inc. v. American Federation of Television and Radio Artists,* 412 F.Supp. 1077 (S.D.N.Y. 1976); *Makress Lingerie, Inc. v. Int'l Ladies Garment Workers' Union,* 395 F.Supp. 110 (S.D.N.Y. 1975); *Chattanooga Mailers v. Chattanooga News-Free Press,* 6 Cir. 1975, 524 F.2d 1305; *Pietro Scalzitti Co. v. Int'l Union of Operating Engineers, Local No. 150,* 7 Cir. 1965, 351 F.2d 576. At least three other circuits, including this Circuit, have recently held the Act applicable to disputes concerning the employment contracts of brokers and their brokerage firms. See *Dickstein v. duPont,* 1 Cir. 1971, 443 F.2d 783; *Tullis v. Kohlmeyer & Co.,* 5 Cir. 1977, 551 F.2d 632; *Legg, Mason & Co., Inc. v. Mackall & Coe, Inc.,* 351 F.Supp. 1367 (D.D.C. 1972). The Third Circuit seems to have developed a conflict on the issue. *Compare Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.,* 3 Cir., 397 F.2d 594, *cert. denied,* 393 U.S. 954, 89 S.Ct. 378, 21 L.Ed.2d 365 (1968), *with Ludwig Honold Mfg. Co. v. Fletcher,* 3 Cir. 1969, 405 F.2d 1123 (denying applicability) and *Local 719, American Bakery and Confectionery Workers of America v. National Biscuit Co.,* 3 Cir. 1967, 378 F.2d 918 (declining invitation to analogize to procedures of Arbitration Act). In the present posture of this case, where the parties have not invoked jurisdiction under the Arbitration Act nor briefed its relevance to the issues before us, we decline to rest our holding on the provisions of the Act and reserve that question for another day. Instead, we reach the same result by fashioning a remedy from the federal common law of labor relations, true to the mandate of *Lincoln Mills.* Cf. *Glendale Mfg. Co. v. Local No. 520, ILGWU,* 4 Cir. 1960, 283 F.2d 936, 940 ("Under the circumstances, it seems appropriate to refer the entire matter back to the arbitrator who may reframe the award in the light of subsequent developments.")

would retain jurisdiction, we think that the best course here would be to allow him the first opportunity to calculate lump sum damages and to compute a lump sum damage award. He

may, of course, consider lost wages, vacations, pension benefits and other such entitlements in fixing his damage award. The fact that the contract which was breached was due to expire April 30, 1976, is controlling as to the period for which damages may be awarded. Nothing in that contract could have created an expectation that the employees would have continued to enjoy the same wages and benefits beyond the expiration of the contract. Since Standard originally offered to allow the Dallas employees to transfer to Denison we assume that it can still find equivalent jobs for any Dallas employees who may yet wish to transfer at this late date, if indeed there are any. Regardless of whether those employees now wish to transfer they are entitled to damages, to be ascertained and computed according to law.

CONCLUSION

[8] To be specific, we are of the opinion that the courts may not enforce that part of the arbitrator's award which grants to Dallas employees who desire to transfer to Denison superseniority as though they had commenced work at Denison on "the first working day any production or maintenance employee began work in Denison." This is in direct and irreconcilable conflict with the rights of the Denison employees, under NLRA, to be represented by IAM, and, through it, to negotiate and contract for wages and working conditions at Denison. The effects of seniority at that facility involve not only Standard Brands and its Dallas employees. Indeed, outside control over seniority rights could deny the Denison employees the most valuable of all the rights protected by the negotiating-contracting process, i. e., the job itself. Moreover, it could also affect advancement, lay-off, recall, and a multitude of other rights which the NLRA vests in IAM as the duly certified bargaining representative of Denison employees.

In denying enforcement of the award as presented, the District Court noted that "It would have been proper for the arbiter to

order the company to pay money damages or to require the defendant to *hire* (emphasis added) Dallas employees."

We conclude that the Judgment of the District Court in declining to enforce the arbitrator's award as rendered should be affirmed.

We further conclude, however, that the case should be remanded to the arbitrator for a determination, after appropriate hearings, of any damages lawfully due the Dallas employees for the breach of their contract by Standard Brands, including the loss of seniority rights.

The case will be remanded for further proceedings not inconsistent herewith.

AFFIRMED and REMANDED.

TUTTLE, Circuit Judge, with whom WISDOM, GOLDBERG, ALVIN B. RUBIN and VANCE, Circuit Judges, join, concurring in part and dissenting in part:

As an alternative course of action to that which I have recommended below, I concur in the majority's remand of the arbitrator's award for a reformulation in the form of lump sum damages. I respectfully dissent from its affirmance of the district court's refusal to enforce the arbitrator's award. I do not feel that the award conflicts with the NLRB certification of the IAM, or that it would require Standard to violate the terms of its agreement with the IAM, therefore, I would reverse the district court's denial of enforcement.

Prompted by the delicate nature of this area of the law, where judicial power and NLRB authority sometimes overlap and potentially conflict, the majority has perceived a conflict between the courts and the NLRB that I do not detect. Both the district court and the majority conclude that the arbitrator's award could

not be enforced due to an "irreconcilable" conflict between the terms of that award and the NLRB certification of the IAM. The NLRB, however, has not declared enforcement of the award to be an unfair labor practice. Thus, the district court and the majority have reached their own conclusion concerning the impact of the award upon the IAM certification.

The majority opinion states that "the nub of the dispute is that if this Court directs enforcement of the arbitrator's award, it *may* be affirmatively causing the employer to be ordered to commit an unfair labor practice under 29 U.S.C. § 158(a)(1)," and (3) (emphasis added). This obviously could not be done. However, the majority goes on to explain in its footnote seven that "if this Court enforced the arbitrator's award, presumably it would be difficult for the NLRB to find the necessary discriminatory intent on the part of Standard" to prove a section 158 unfair labor practice. Further, the footnote disclaims any opinion as to whether enforcement of the award *would* constitute an unfair labor practice at all, quite accurately explaining that such decisions are a task for the Board.

After glossing over this serious charge that compliance with the award could cause Standard to commit an unfair labor practice, the majority then turns to the landmark cases of *Lincoln Mills* and the "Steelworkers Trilogy" in search of a basis for this "irreconcilable" conflict. From these cases the majority distills a three pronged test for the enforcement of the arbitration award and finds that it fails to comply with the third criterion, because it is "repugnant" to the NLRA. The majority explains that the right of employees to bargain collectively is the essence of our federal policy governing labor management relations, and correctly states that if an arbitration award conflicts with that policy, the statutory policy must prevail. The breakdown in this rationale lies in its failure to explain with precision the manner in which this award is repugnant to the federal policy encouraging collective bargaining. The only support of this position I can

find is when the majority quotes the language of the district court:

> The arbiter clearly recognized that his award would lead to employee frictions that the NLRB would oversee. It would have been proper for the arbiter to order the company to pay money damages or to require the defendant to hire the Dallas employees, but he took the further step of specifying wages and working conditions *after* the NLRB had certified the IAM as the exclusive bargaining agent for the Denison unit. That certification has now withstood an appeal to the NLRB. It is the court's opinion that the arbiter's action in this regard conflicts with NLRB certification.

Although I do not believe the majority would find that the "irreconcilable" conflict would arise merely from the creation of "employee friction," that seems to be the only basis for its determination that the award is repugnant to the NLRA.[1] This is especially clear to me since the opinion states quite clearly that the same dollar amounts could have been awarded to the victims if couched in different terms.

I recognize that an influx of Dallas Teamsters, paid at higher rates than their Denison counterparts, could potentially have caused jealousy and conceivably eroded the IAM's strong support at the Denison plant, but I do not believe that this would amount to an unfair labor practice or that it would create a conflict with the NLRB so severe as to preclude enforcement of the arbitrator's award—a process equally significant in the proper operation of the collective bargaining system. *See, e. g., United*

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[1] In taking the position that the award is unenforceable because of the application of Dallas wages and benefits to the Denison plant, the majority finds support in several decisions of other courts of appeals. I am not persuaded that this gives rise to a fatal conflict with the NLRA, but I have nothing to add to the discussion of these cases other than that stated in the panel opinion. *General Warehousemen and Helpers Local 767 v. Standard Brands, Inc.*, 560 F.2d 700, 707 (5th Cir. 1977).

Steelworkers v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers v. Warrior Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957).

I believe that if the arbitrator's decision is viewed as essentially a make-whole award, the damaging conflict perceived by the majority is minimized. As the district court and the majority opinion suggest, the arbitrator could have validly ordered the company to pay a lump sum damage award. If the lump sum is calculated on the basis of the difference in the Dallas and Denison wage scales, then the difference between the award of wages and the lump sum seems to be more a matter of form than substance. Although the award may have created some friction if it had been paid as a "Dallas wage" in Denison, I do not believe this would have required Standard to violate its agreement to bargain with the IAM, as stated by the majority. While I am concerned with the ambiguity of the arbitrator's language, I feel the uncertainties can be cleared up on remand. The ambiguity is certainly not a sufficient reason to refuse to enforce the award. Clearly, the arbitrator's intent was to make the Dallas employees whole for any losses they may have suffered. Thus, I believe it can be fairly argued that if lump sum damages are appropriate, then the arbitrator's order of "wages and other benefits" for the transferees in accordance with the Dallas contract can be modified on remand to avoid any conflict with the NLRB.

Most significantly, I feel that it is a grave mistake to withhold enforcement of the arbitrator's award without a clear showing that it is repugnant to our national labor policies. By affirming this denial, the majority was forced to accept the trial court's construction of the NLRA as to what may constitute an unfair

labor practice, a task which is properly reposed in the NLRB. If the court had enforced the award, any inconsistency with the Act or conflict with the Board's certification of the IAM could have then been tested in an unfair labor practice proceeding, with, of course, an appeal to this Court.

I would reverse the trial court's refusal to enforce the award and remand for that court to construe and enforce it. In the event the court could not adequately interpret the award, I, of course, would agree with the majority that the matter should be remanded to the arbitrator for a clarification and perhaps a reformulation.

United States Court of Appeals
Fifth Circuit

Office of the Clerk

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, LA. 70130

December 28, 1978

TO ALL PARTIES LISTED BELOW:

NOS. 75-3797 and 76-1579—
General Warehousemen and
Helpers vs. Standard Brands, Inc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.
See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
By SALLY HAYWARD
Deputy Clerk

cc: Mr. James L. Hicks, Jr.
Messrs. William L. Keller
Allen Butler

29 USC § 185

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * * * * * *

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

1976 CCH NLRB ¶ 20,020

[¶ 20,020] STANDARD BRANDS, INC.

Case No. 16-CA-6411. September 30, 1976.

From Harold J. Datz, Associate General Counsel, Division of Advice.

Refusal to Bargain—Compliance with Arbitration Award—"Bumping" by Transferees

A complaint need not be issued where a union requested withdrawal of a refusal-to-bargain charge concerning the transfer into a plant of employees who then retained the seniority that they had earned at a now closed plant. A union representing the transferees successfully arbitrated the closing of the plant at which it was the bargaining representative. The award ordered the transfer of these employees, and applied the seniority gained at the closed plant to the new plant. The union representing employees at the new plant then filed its charge citing the "bumping" of its members by the transferees. However, the employer's actions were in compliance with the arbitration award and, therefore, privileged. Section 8(a)(5). Back reference.—¶3177.805.

From Text of Memorandum

Standard Brands, Inc., herein the Employer, leased a plant in Dallas, Texas to produce margarine. The Dallas employees, approximately 48 in number, are represented by the International Brotherhood of Teamsters, Local 767, herein the Teamsters. The Employer built a new margarine plant in Dennison, Texas, about 75 miles away, continuing many of the same production functions as the Dallas plant. The new plant opened in late October, 1974. When the Employer began operations at Dennison, the Teamsters filed a grievance, on November 21, 1974, under a provision of their contract which provided, *inter alia*, that if the Dallas operations were transferred to a new plant, the jobs at the new plant would not be filled until the Dallas employees had an opportunity to fill the jobs. The Employer's compliance with the arbitration award resulting from this grievance formed the basis for the instant charge.

The Employer hired all new employees at the Dennison plant, and the Machinists filed a petition for an election at Dennison in December, 1974. The Teamsters intervened and sought to obtain voting rights for the Dallas employees based on their contract. Voting rights for the Dallas employees were denied by the Region based essentially on the Employer's contention that it did not intend at that time to close down the Dallas plant. The Machinists won the Dennison election in December, 1974. The Teamsters filed objections to the election, which the Regional Director overruled. The Board adopted the Regional Director's recommendations and certified the Machinists as the exclusive bargaining representative of the Dennison employees on May 22, 1975.

On September 2, 1975, the Employer announced the closing of the Dallas plant. The arbitrator's award in the Teamster grievance issued on September 20, 1975. The arbitrator concluded *inter alia*, that the Employer had deliberately misrepresented facts and mislead both the Teamsters and the Board concerning the new Dennison plant, its operations, and its connection to the closure of the Dallas plant, i.e., that the Employer had planned all along to do exactly what it did in transferring operations from Dallas to Dennison. The arbitrator found that the Employer knowingly provided false information to the Board, both as to its intent to expand the Dennison unit and as to its intent to close down the Dallas plant. The arbitrator directed the Employer to offer transfers to Dennison to all the Dallas employees and to grant the transferees seniority rights based on their service with the Employer under the Teamster contract.[1] Further, the terms of the Teamsters contract were to govern these transferees in Dennison.[2]

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[1] The arbitrator did not require the discharge of present Dennison employees to provide jobs for the Dallas transferees.

[2] Based on the arbitrator's award, the Teamsters filed a motion with the Board to reopen the certification of the Machinists, which motion was denied.

The Employer then began to transfer Dallas employees to Dennison.[3] On January 20, 1976, the Machinists filed the instant Section 8(a)(5) charge[4] based on the bumping of a unit employee by a Dallas transferee without the Employer's having consulted with the Machinists. The bumping was the result of the application of seniority rights pursuant to the arbitral award. The Teamsters petitioned for intervenor status in the instant case, which motion was granted. On May 11, 1976, the Machinists asked to withdraw the instant charge, citing both the Employer's assurance that if the Teamsters lost the arbitration in the Circuit Court,[5] the seniority of Dallas employees would be reduced, and the Machinists' apprehension that the instant charge gave the Teamsters another opportunity to attack the Machinists' certification.

Action

It was concluded that the Machinists' request to withdraw the instant charge should be approved. Under the circumstances set forth herein, the Employer's actions in transferring a Dallas employee to Dennison and applying Dallas seniority to him were considered to have been in compliance with, and, therefore, privileged by the arbitration award.[6] Thus, given the role of

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[3] The arbitrator's award indicates that most Dallas employees did wish to transfer to Dennison.

[4] A companion Section 8(a)(3) charge was withdrawn with the approval of the Region.

[5] Enforcement of the arbitral award was denied by the district court insofar as the Teamster contract's wages and working conditions were to be applied to the Dallas transferees. The district court left undisturbed that portion of the award which applied Dallas seniority to the transferred employees, apparently on the grounds that this aspect had not been contested by the Employer. However, the Employer is challenging the entire award in the Fifth Circuit Court of Appeals, where the case is now pending.

[6] Cf. *Standard Candy Co.*, [1964 CCH NLRB ¶ 13,261] 147 NLRB 1070, 1073; *Southern Transport Co.*, [1963 CCH NLRB

arbitration within the framework of the overall federal labor relations policy,[7] and the equities herein in light of the arbitrator's discussion of the Employer's conduct with respect to the Teamsters, it cannot be said that this arbitral award, as modified, unlawfully interferes with the Section 9(a) rights of the Machinists in Dennison. The transfer of employees was considered to be the result of the Employer's compliance with the terms of the arbitration and the subsequent bumping of a unit employee because of the transferee's Dallas seniority was also considered to be a consequence of that award. As such, the Employer's actions were viewed as controlled by the dictates of a binding legal obligation placed upon it by the award.

In addition, it was noted that the Machinists' Union, the certified bargaining representative at the Dennison plant, no longer wishes to pursue the Section 8(a)(5) charge. In view of the above, it was concluded that it would not effectuate the purposes of the Act to withhold approval of the Machinists' request to withdraw the instant charge.[8]

¶ 12,801] 145 NLRB 615, *enf'd* 58 LRRM 2822; *EEOC v. AT&T Co.*, 13 FEP Cases 392, 415, 416, where the district court ordered that the seniority provisions of an affirmative action plan must "override" any contractual provisions concerning seniority.

[7] Cf. *Collyer Insulated Wire*, [1971 CCH NLRB ¶ 23,385] 192 NLRB 837, 843. The instant case does not, however, fall under the standards of review enunciated in *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082. Thus, the arbitrator was not concerned with the same matters as the charge. Rather, the charge was filed because of actions taken pursuant to the arbitral award. Accordingly, the instant disposition is not intended to indicate a deferral to or approval of the arbitral award.

[8] If the Circuit Court is being asked by the Teamsters to apply other provisions of the Teamster contract to the Dennison employees so that the Machinists' certification rights would be undermined, the Machinists may wish to seek Board intervention. Such a request would be forwarded to the Division of Litigation.